Federal Court  Cour fédérale

Date: 20080609

Docket: IMM-4705-07

Citation: 2008 FC 721

Ottawa, Ontario, June 9, 2008

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ROBERTO NATAN RAMIREZ CHAGOYA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application to review the legality of a decision dated October 17, 2007 (the impugned decision), by the Refugee Protection Division of the Immigration and Refugee Board (the Board) determining that the applicant is not a "Convention refugee" or a "person in need of protection" under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as amended (the Act).

[2] The applicant, Roberto Natan Ramirez Chagoya, is a Mexican citizen. He fears persecution everywhere in his country by reason of his membership in a particular social group, i.e., homosexuals. The Board did not question the truthfulness of the applicant's story or the seriousness of certain incidents that took place, which, the Board said, "could be qualified as serious mistreatment". However, although "the repeated actions that were carried out constitute persecution", the Board found that "the claimant has not discharged the burden of proof on him to show that the Mexican authorities were unable to protect him".

[3] Prior to *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (*Dunsmuir*), a finding of the Board regarding state protection was reviewable against a standard of reasonableness *simpliciter:* see *Chaves v. Canada (Minister of Citizenship and Immigration*), 2005 FC 193, [2005] F.C.J. No. 232 (QL) and *Hinzman v. Canada* (*Minister of Citizenship and Immigration),* 2007 FCA 171, at paragraph 38 (*Hinzman*). Taking into account the fact that the reasonableness *simpliciter* standard has been consolidated with the patently unreasonable standard into a single standard, but with a variable spectrum, I do not believe that the Court's review of the legality of a finding by the Board on state protection is really any different today; the Court's analysis is concerned essentially with the "existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir*, at paragraph 47).

[4] Let us begin this analysis by reviewing certain principles. First, absent a complete breakdown of the state, it should be assumed at the outset that the state is capable of protecting its nationals: *Canada (Department of Employment and Immigration) v. Villafranca,* [1992] F.C.J. No. 1189

(F.C.A.) (QL). But this presumption of fact can be displaced by clear and convincing evidence (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (*Ward*)). In that regard, it will not suffice for the refugee claimant to show that his or her government was not always able to protect persons in the same position. Likewise, it cannot automatically be said that a state is unable to protect one of its nationals because some local police officers refused to take action (*Kadenko v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1376 (QL) (*Kadenko*)).

[5] That being said, though government protection is not perfect, some protection must exist, the minimum level of which does not have to be determined by the Court. Moreover, it is not reasonable to require refugee claimants to put their lives or the lives of their families in danger. In the same way, claimants do not have to suffer greater persecution (which may consist of repeated discriminatory acts amounting to persecution). This Court pointed out recently in *Shimokawa v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 445, [2006] F.C.J. No. 555 (QL), at paragraph 21: ". . . in seeking state protection, refugee claimants are not expected to be courageous or foolhardy. It is only incumbent upon them to seek protection if it is seen as being reasonably forthcoming. If the refugee claimants provide clear and convincing evidence that contacting the authorities would be useless or would make things worse, they are not required to take further steps." [My emphasis.] In short, it is unreasonable to force refugee claimants to ask for protection that has little chance of materializing or that will be a long time coming, simply to demonstrate that state protection is ineffective.

[6] Assessing whether a state is capable of, and willing to, provide protection to its nationals is not an abstract exercise. The Board must examine the personal situation of each refugee claimant in a practical manner. Its findings in this regard must be evident from reading the decision and must be

supported by the evidence in the record. On this point, in *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, [2006] F.C.J. No. 439 (QL) (*Avila*), I myself noted at paragraph 27:

> In order to determine whether a refugee protection claimant has discharged his burden of proof, the Board must undertake a proper analysis of the situation in the country and the particular reasons why the protection claimant submits that he is "unable or, because of that risk, unwilling to avail [himself] of the protection" of his country of nationality or habitual residence (paragraphs 96(*a*) and (*b*) and subparagraph 97(1)(*b*)(i) of the Act). The Board must consider not only whether the state is actually capable of providing protection but also whether it is willing to act. In this regard, the legislation and procedures which the applicant may use to obtain state protection may reflect the will of the state. However, they do not suffice in themselves to establish the reality of protection unless they are given effect in practice: see *Molnar v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 1081, [2003] 2 F.C. 339 (F.C.T.D.); *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCTD 429, [2003] 4 F.C. 771 (F.C.T.D.).

[7] The presumption of state protection applies equally to cases where an individual claims to fear persecution by non-state entities and to cases where the state is alleged to be the persecutor (*Hinzman*, paragraph 54). This presumption is even more applicable when the country of origin is a democratic country like Israel (*Kadenko*) or the United States (*Hinzman*) whose independent and strong state institutions are universally recognized. In fact, *Kadenko* and *Hinzman* refer to "democracies" that do not face endemic and flagrant corruption in the state apparatus or in the police forces or the judiciary, which may be the case in some "emerging" democracies.

[8] Also, at paragraphs 30 and 31 of *Avila*, I noted that the Board had to qualify the application of *Kadenko* somewhat. In the impugned decision, the Board actually relied on this case in a general way to deny the refugee claim in the alternative:

> At the same time, *Kadenko, supra*, indicates that it cannot be automatically found that a state is unable to protect one of its

nationals when he has sought police protection and certain police officers refused to intervene to help him. Once it is established that a country (in that case Israel) has judicial and political institutions capable of protecting its nationals, from the refusal of certain police officers to intervene, it cannot by *ipso facto* inferred that the state is unable to do so. It is on this account that the Federal Court of Appeal mentioned *obiter* that the burden of proof on the claimant is to some extent directly proportional to the "degree of democracy" of the national's country. The degree of democracy is not necessarily the same from one country to another. Therefore, it would be an error of law to adopt a "systemic" approach as to the protection offered to the nationals of a given country. This is what is likely to happen when the reasons for dismissal given by the Board are too general and may apply equally to another country or another claimant (*Renteria et al. v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 284, 2006 FC 160).

Whether the issue be the best interest of the democratic state in question and of civil society in general, or the individual interest of the victim or perpetrator of an alleged criminal offence, the payment of a monetary or other benefit of any kind to a police or law officer is illegal. Of course, if corruption is widespread it may ultimately lead to undermining the trust individuals may have in government institutions, including the judicial system. As the Supreme Court has noted, "democracy in any real sense of the word cannot exist without the rule of law" (*Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, at paragraph 67). Due process of law and equality before the law are the vital strength of any democracy and create a legitimate expectation in individuals that the state will do what is necessary to go after criminals and bring them to justice, and if necessary to stamp out corruption. The independence and impartiality of the judiciary and its components are not negotiable. These are fundamental values in any country which claims to be a true democracy. Therefore, the degree to which a state tolerates corruption in the political or judicial apparatus correspondingly diminishes its degree of democracy. That being said, I do not have to decide here whether the documentary evidence established, as the applicant vigorously claimed, such a degree of corruption that it can be said it was not unreasonable in the circumstances for the applicant not to approach the police of his country before seeking international protection. Due to its special expertise and its knowledge of the general conditions prevailing in a given country, the Board is in a much better position than this Court to answer such a question. Nevertheless, the Court must still be able to understand the Board's reasoning.

[9] My colleague, Madam Justice Danielle Tremblay-Lamer, in *Zepeda v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 491, [2008] F.C.J. No. 625 (*Zepeda*), at paragraphs 17-20, addresses the more or less probative nature of the presumption of state protection in the case of Mexico. Justice Tremblay-Lamer refers, *inter alia*, to Madam Justice Johanne Gauthier's analysis in *Capitaine v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 98, [2008] F.C.J. No. 181 (QL) (*Capitaine*), which, incidentally, refers to the *Avila* case:

> With respect to the strength of the applicable presumption in Mexico, the respondent cites the case of *Velazquez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 532, [2006] F.C.J. No. 663 (QL), at para. 6, in which Justice Michael Phelan stated "Mexico is a functioning democracy, and a member of the NAFTA, with democratic institutions. Therefore, the presumption of state protection is a strong one." (see also *Canseco v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 73, [2007] F.C.J. No. 115 (QL), at para. 14; *Alfaro v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 460, [2006] F.C.J. No. 569 (QL), at para. 18, highlighting the free and democratic nature of Mexican society).
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> However, other jurisprudence has focussed on the problems that remain in Mexico's democracy. Recently, Deputy Justice Orville Frenette in *De Leon v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1307, [2007] F.C.J. No. 1684 (QL), at para. 28 indicated that as a developing democracy with problems including corruption and drug trafficking involving state authorities, the presumption of state protection applicable to Mexico is more easily overturned.
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> Similarly in *Capitaine v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 98, [2008] F.C.J. No. 181 (QL), at paras. 20-22, my colleague, Madam Justice Johanne Gauthier, addressed the presumption of state protection in the context of Mexico's democracy:
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> > 20 Mexico is a democracy to which a presumption of state protection applies, even if its place on the 'democracy spectrum' needs to be assessed to determine what credible and reliable evidence will be sufficient to displace that presumption . . .
> >
> > 21 In developed democracies such as the U.S. and Israel, it is clear from *Hinzman* (at paras. 46 and 57) that to rebut the presumption of state protection, this evidence must include

> proof that an applicant has exhausted all recourses available to her or him. It is also clear that, except in exceptional circumstances, it would be unreasonable in such countries not to seek state protection before seeking it in Canada.
>
> 22 The Court does not understand *Hinzman* to say that this conclusion applies to all countries wherever they stand on the 'democracy spectrum' and to relieve the decision-maker of his or her obligation to assess the evidence offered to establish that, in Mexico for example, the state is unable (although willing) to protect its citizens, or that it was reasonable for the claimant to refuse to seek out this protection. . . .

I find Madam Justice Gauthier's approach to the presumption of state protection in Mexico to be persuasive. While Mexico is a democracy and generally willing to protect its citizens, its governance and corruption problems are well documented. Accordingly, decision-makers must engage in a full assessment of the evidence placed before them suggesting that Mexico, while willing to protect, may be unable to do so. This assessment should include the context of the country of origin in general, all the steps that the applicants did in fact take, and their interaction with the authorities (*Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1211, [2007] F.C.J. No. 1563 (QL), at para. 21; *G.D.C.P. v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 989, [2002] F.C.J. No. 1331 (QL), at para. 18). [My emphasis.]

[10] I am in complete agreement with the analysis of Justices Tremblay-Lamer and Gauthier in *Zepada* and *Capitaine*. After reviewing the entire record, including the documents about the prevailing conditions in Mexico, I am of the view that the Board's analysis of the documentary evidence was superficial and selective and did not take into account the applicant's personal situation. Specifically, the Board chose to disregard or not deal with relevant evidence that could have supported the applicant's arguments, and this makes the Board's finding that "the claimant has not discharged the burden of proof on him to show that the Mexican authorities were unable to protect him" reviewable in this case.

[11] The applicant alleges that his life has been [TRANSLATION] "a long voyage of discrimination, harassment and repeated persecution." From a young age, he suffered very serious sexual abuse by his family. According to the applicant's Personal Information Form (PIF), "it was at the age of 21 that I accepted the fact that I was gay, fully aware and openly sharing the news to my close friends and family. . . . My family then had two excuses for rejecting me, the first one, my decision to become and [*sic*] actor and the second one my homosexuality."

[12] In 2002, the applicant had his first opportunity to act in a gay play "ŒDIPO GAY" in which he appeared nude. According to his PIF, "[t]he play was a critical success, and of course was quite controversial because of the subject. There was extensive coverage in print, radio and on television" (see also the certified tribunal record, pages 146-160). The applicant alleges that he was mistreated by the police because of his role in ŒDIPO GAY:

> Another way in which I experience aggression and discrimination back in my country due to my sexual orientation was in [*sic*] the hands of the police. On a street near the theater in which Edipo Gay was playing, as I was walking home after work, two police officers in their car stopped by me and got out of their car. They told me to stop and to produce ID. They asked my name and where I lived, and one started using his stick to rub it against my lower back and at one point pressing it forcefully against my anus. After a few questions and insults towards me, I realized that they had recognized me from my promotional posters of Edipo Gay. They insulted me in regards to my homosexuality and in a threatening manner one of them said to me to "watch out, be careful one day you might be found raped and dead".

[13] Because of his public image as a homosexual, people no longer wanted to offer him certain advertising contracts or certain roles as an actor or comedian. He also had problems with the director of the play, who sexually harassed him. In addition, the applicant stated in his PIF, "[W]hen I walked on the street, I had to act like a straight man, or I would be mocked or even attacked, especially in certain neighborhoods."

[14] In April 2004, July 2004 and January 2005, graffiti was written on the walls near his small restaurant, insulting him and telling him to go away. On each of those occasions, in addition to the graffiti, furniture was stolen and items were broken:

> In 2004 and as a result of trying to distance myself from acting circles I saw myself in need of work and as a result of that decided to open a small restaurant. I rented a small space close to a market, running the place with my mother. I was robbed several times and graffiti was sprayed on the walls, the thieves left messages such as "go away you little faggot", "whore", etc. At times they destroyed some of the furnishings, after a while I decided to close shop given that I didn't have the means to keep investing.

[15] In short, the applicant alleged in his PIF, "I think that I am blacklisted not only because I am Gay, but because I was the protagonist in a politically charged play, EDIPO GAY, which made me a sort of icon for the gays in Mexico, at least for the straight community."

[16] As a result of the actions taken against him in connection with the business activities involving his restaurant, the applicant filed complaints with the police on three separate occasions. According to the transcript of the testimony, in April 2004, the applicant

> [TRANSLATION]
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> went to the police station in his neighbourhood. [He] had to write [his] name in a notebook that they had; everyone who filed a complaint had to write his or her name in the notebook. . . . They had [him] meet with an officer. [The applicant] recounted the facts. He was asked what was missing. They made a list. . . . They told [him] that they would send someone to check out the location and . . . to commence an investigation to find the people who had done this.

[17] The same day, two police officers arrived at the applicant's restaurant: [TRANSLATION] "They took some photographs and left." Two weeks after the incident, the applicant went to the police station to ask questions. The police officers [TRANSLATION] "simply said that they were

conducting an investigation." In July 2004, after the second homophobic graffiti incident, the applicant filed a second complaint. An officer took notes, but the police did not even make a list of the missing items. Last, in January 2005, the applicant filed his third complaint. The police refused to take notes, and one of the officers said [TRANSLATION] "This was not the only case they had, and that [his] case would take its course, that it was proceeding, that they could not do anything at that time, that it was taking its course." (see certified tribunal record, pages 314-318).

[18] In the impugned decision, the Board found that the applicant did not establish that the incident that occurred in the street in 2002 (where police officers insulted, assaulted and threatened him) constituted persecution. Nonetheless, with regard to the graffiti and the thefts committed in his restaurant, the Board was of the view that those repeated actions constituted persecution. In considering the question of whether the Mexican state was able to protect the applicant, the Board simply noted that even if "[t]he documentary evidence clearly shows that the discrimination suffered by homosexuals in Mexico is a serious problem", the documentary evidence also shows that not only are efforts being made to combat the prejudice suffered by these individuals, but that legislative amendments have been passed, specifically to the Federal District Penal Code, along with new laws intended to prevent and eliminate discrimination. The Board observed: "The fact that certain victims feel reluctant to avail themselves of administrative recourse against the individuals who attacked them because they doubt the effectiveness of the remedies involved does not constitute clear and convincing evidence that the state is unable to protect them; it is simply evidence that such protection is not perfect." The Board determined that the applicant did not discharge the burden of proof on him to show that the Mexican authorities were unable to protect him, and his refugee claim was denied.

[19] While it is true that there is a presumption in law that the Board considered all the evidence and that there is no need to mention all the documentary evidence that was before it, where there is important material evidence on the record that contradicts the factual finding of the Board, a blanket statement in the decision that the Board considered all of the evidence will not be sufficient. The Board must provide reasons why the contradictory evidence was not considered relevant or trustworthy: see *Zepeda*; *Simpson v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 970, [2006] F.C.J. No. 1224 (QL) and *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (QL). In the case before me, the Board did not do so. It simply relied on the statement that Mexico is a democracy and that no clear and convincing evidence was presented by the applicant to rebut the presumption of state protection. However, the Board did not address the contradictory evidence.

[20] For example, according to the Board's report dated February 2007, "Issue Paper Mexico. Situation of witnesses to crime and corruption, women victims of violence and victims of discrimination based on sexual orientation" (available on the Board's Web site and filed by the applicant under P-8), "[A]ccording to the CCCCOH [the NGO Citizens' Commission Against Homophobic Hate Crimes, which publishes a report on the incidence of homophobic crimes], there were 332 homophobic killings across Mexico between 1995 and 2004. . . . [L]egislation to address homophobic 'hate crimes' does not exist in Mexico." Furthermore, "publicly known homosexuals would likely face a higher risk . . . because of their higher public profile."

[21] The report prepared in December 2003 by Andrew Reding, "Sexual Orientation and Human Rights in the Americas", states, "It should be kept in mind, however, that there is often a breach between law and practice in Mexico. . . . On the weekend of April 6-7, 2002 city and state police

raided gay bars in the city of Aguascalientes, arresting 38 people. All were charged with 'prostitution in public areas' . . . [P]olice used excessive force, and failed to substantiate the charges. When the defendants were brought before a judge, the judge said he 'was fed up with so many faggots'. . . " (tab 6.1 of the National Documentation Package on Mexico, filed under A-1).

[22] Moreover, according to the article prepared on August 13, 2004, by the International Gay and Lesbian Human Rights Commission, "Mexico City: Protest Arbitrary arrests of young gay men in Zona Rosa, Cuauhtemoc District" (applicant's exhibit P-8), "[a] group of seven young gay male students were arrested on July 20, 2004, in Zona Rosa, Cuauhtemoc District, Mexico City and charged with engaging in sex work. Police had no evidence that they were sex workers, and they had not made any attempt to collect such evidence. . . . According to a policewoman, the police targeted the friends because two men were holding hands. Similar incidents have occurred in recent months; in flagrant violation of the country's very progressive Federal Law . . . "

[23] The documentary evidence indicates, "[W]hile the homosexual community has made some progress within the political and legal landscape of Mexico, traditional attitudes of intolerance and evidence of mistreatment still persist in certain areas. . . . Despite these gains, reports of homophobic crimes and intolerance continue . . . " ("MEX42621.E", April 15, 2004, tab 6.3 of the National Documentation Package on Mexico).

[24] Last, according to "The treatment of homosexuals and availability of state protection" ("MEX101377.E", June 5, 2006, tab 6.11 of the National Documentation Package on Mexico), "[H]omosexuality is not a crime in Mexico . . . However, the country has had a long history of [translation] 'attacks and murders' of homosexuals and transsexuals. [H]omophobic beliefs and

practices were common, reflected principally in entertainment programs and every day attitudes".

In particular:

> The [CCCCOH] . . . stated that 15 homophobic or transphobic murders occur each month in Mexico. Other sources estimated that between 100 and 180 homophobic killings take place each year in Mexico . . . placing Mexico second on the continent for homophobic murders. According to the CCCCOH, the majority of victims are men between 20 and 40 years old. . . . Most murders of homosexuals occurred in the Federal District . . .
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> [T]he Mexican government does not provide special protection for homosexuals, lesbians and transsexuals. . . . [H]omosexuality is considered a problem but homophobia is not . . . [W]hen a crime against a member of the homosexual, transsexual or lesbian community is investigated, authorities tend not to consider the fact that the crime has been motivate [*sic*] by 'hate'.

[25] In this case, it could reasonably be argued that the applicant presented clear and convincing evidence that the state did not protect him effectively. This involves more than a mere absence of local protection. In order to assess the applicant's personal situation, considering that his credibility was not challenged in the decision at issue, credence must be given to the particular facts that hastened his departure from Mexico.

[26] Although the Board determined that the applicant did not establish that the incident in 2002 where police officers insulted, assaulted and threatened him constituted persecution, the Board was of the view that "the reprehensible actions of these police officers constitute discrimination and assault against the claimant . . . ". Clearly, in the Board's opinion, the applicant suffered "mistreatment . . . [which] attacks certain of his basic rights . . . ". It was in this context that the applicant filed three complaints. This is not a situation where the applicant never filed a complaint or where he tried to obtain state protection only once. On the contrary, after suffering mistreatment

by the police themselves, the applicant filed a complaint numerous times, which, it must be said, led to nothing for all practical purposes.

[27] Having reviewed the entire record, including the documents about conditions in Mexico, the Court finds that the impugned decision of the Board is not supported by the facts and is unreasonable. In determining that there was adequate protection in Mexico and that the applicant should have filed more complaints, and in requiring him to exhaust all the remedies available to him in his country, the Board made an unreasonable decision: the Board failed to consider the applicant's particular situation and selectively read the documentary evidence in the record, which is far from being univocal. I reach this conclusion bearing in mind the Court's limited role in this case. The Court is not sitting on appeal of the Board's decision but on a judicial review. Accordingly, I do not have to substitute my judgment for that of the Board or make specific findings of fact based on the evidence as a whole. It must be reiterated that, with respect to "state protection", each case turns on its own facts (*Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1211, [2007] F.C.J. No. 1563 (QL), at paragraph 26). Again, at the risk of repeating myself, the Board simply chose to disregard or not deal with relevant evidence that could have supported the applicant's arguments, and in the circumstances, this makes its decision reviewable: see *Avila*, at paragraph 36. This is sufficient to set aside the impugned decision and to send the decision back for a new hearing.

[28] For these reasons, the application for judicial review is allowed, and the matter will be sent back for redetermination by a different panel of the Board. This case does not raise any question of general importance.

ORDER

THE COURT ORDERS that the application for judicial review is allowed and the matter is sent back for redetermination by a different panel of the Board. There is no question to certify.

"Luc Martineau"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4705-07
STYLE OF CAUSE:	ROBERTO NATAN RAMIREZ CHAGOYA v. M.C.I.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	June 3, 2008
REASONS FOR ORDER AND ORDER:	MARTINEAU J.
DATED:	June 9, 2008

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