Date: 20080922

Docket: IMM-1104-08

Citation: 2008 FC 1058

OTTAWA, Ontario, September 22, 2008

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

Enrique SANCHEZ GARCIA
Maria del Rosario MONTES VALDEZ
Jorge Manuel SANCHEZ MONTES
Jose Antonio SANCHEZ MONTES
Joshua Isai SANCHEZ MONTES
Ariel Noe SANCHEZ MONTES
Ana Paolo SANCHEZ MONTES
Isaac SANCHEZ MONTES

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are a family of eight, all citizens of Mexico. They allege that the family became a target of extortion as a result of a computer business the adult male applicant, Mr. Sanchez, operated in Mexico City. After refusing to pay, he was kidnapped in April 2004 and seriously injured before his wife Ms. Montes paid part of a ransom demand. A complaint to police had no result.

[2] On the advice of a lawyer in Mexico City, the family moved to the state of Hidalgo, where they remained without incident until September 2006. Mr. Sanchez again operated a computer business. They assert that in September 2006, friends of theirs were assaulted by unknown men wanting to know their whereabouts. They received threatening phone calls and Ms. Montes was followed home. The lawyer was again consulted and, on his advice, they fled Mexico for Canada and claimed refugee protection.

[3] The Refugee Protection Division (RPD) decided on February 13, 2008 that they were neither Convention refugees nor persons in need of protection. The Panel member found that they were the victims of crime and, as such, there was no nexus to any of the Convention grounds. It was also found that they had not rebutted the presumption that the Mexican authorities were willing and able to protect them from persecution and that they had a viable internal flight alternative (IFA) available to them in Pachuca.

[4] The applicants raise two issues: (1) whether they were denied procedural fairness and (2) whether the Panel member considered the wrong standard of proof in finding that state protection exists.

[5] It is well established that a reviewing Court must set aside a decision which is a result of an unfair process, unless there is no possibility that a fair process would result in a different decision. The selection of the wrong standard against which to assess evidence is an error of law and may result in a grant of relief pursuant to section 18.1(4)(c) of the *Federal Courts Act*.

[6] In their original submissions, the applicants argued that the Panel member denied them a fair process by deciding their case for reasons which included an internal flight alternative and credibility. At the close of the applicants' hearing, the member had indicated clearly to them and their counsel that state protection was the only issue remaining at play. They asserted that this denied them a proper opportunity to be heard and thus breached the rules of natural justice.

[7] The respondent submitted that any denial of procedural fairness was immaterial, given that the RPD's findings on internal flight alternative and credibility were made in the alternative to the finding that state protection was available.

[8] In reply, the applicants agreed that the three findings were separately made and conceded that if the state protection finding was made without error the RPD's decision should stand.

[9] Given that I do not find that the Panel member applied the wrong standard to the evidence regarding state protection, the issue of procedural fairness must be addressed. I find that it was clearly wrong for the RPD to direct the applicants to confine their submissions to one limited area if the Panel member had broader concerns which informed his or her decision. The opportunity to be heard, while variable, must include the opportunity to know the case to be met and to attempt to meet it. Such an opportunity was here denied. However, since state protection is a complete answer to a refugee claim, it is true that, as that decision was correctly and reasonably made, there is no benefit to sending this case for reconsideration.

[10] In the case at bar, the applicants submit that the RPD erred in relying on *Xue v. Canada (Minister of Citizenship and Immigration)* (2000), 195 F.T.R. 229, when stating that the applicable standard of proof for a finding of state protection was higher than the balance of probabilities, being "within the preponderance of probability category". The Federal Court of Appeal clarified this point in *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, holding that *Xue* should not be read to mean that the standard of proof was higher than normal for state protection.

[11] Despite the respondent's denial that a standard other than that of the balance of probabilities was applied, I cannot see how else to read the relevant passage. That said, the *Carillo* decision was released approximately one month after the decision here under review. As such, the Panel member's statement of the law was correct at the time it was made; it nevertheless is incorrect at the present time.

[12] I allow the present application for judicial review and return the matter for a new hearing on the issue of state protection based on the standard of the balance of probabilities.

[13] No question of general importance was submitted for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application is allowed and the matter is hereby returned for a new hearing on the issue of state protection based on the standard of the balance of probabilities.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1104-08
STYLE OF CAUSE:	ENRIQUE SANCHEZ GARCIA ET AL v. M.C.I.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 4, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	TEITELBAUM D.J.
DATED:	September 22, 2008

APPEARANCES:

Alyssa Manning	FOR THE APPLICANT
Bridget A. O'Leary	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Vandervennen Lehrer Barristers and Solicitors	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT