Federal Court  Cour fédérale

Date: 20080916

Docket: IMM-4434-07

Citation: 2008 FC 1029

Ottawa, Ontario, September 16, 2008

PRESENT: Mr. Justice de Montigny

BETWEEN:

JOSE ALFREDO XOCOPA MARTELL,
ADRIANA BELTRAN CUATECO,
DAENA VALERIA XOCOPA BELTRAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are seeking judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Panel), which rejected their claim for refugee protection on September 20, 2007. The Panel found them to be neither refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

[2] The principal applicant, Jose Alfredo Xocopa Martell, alleged that his life and those of his spouse, Adriana Beltran Cuateco, and daughter, Daena Valeria Xocopa Beltran, were threatened by Enrique Garcia (El Gato) and by the police officers who were protecting him. The Panel found that the applicants were not credible and that they did not discharge their burden of showing that the Mexican authorities were not capable of protecting them.

[3] For the reasons below, the Court is of the view that this application for judicial review should be dismissed. In light of the evidence in the record, the Panel could reasonably find that the applicants failed to rebut the presumption that the Mexican state could protect them.

I. Facts

[4] According to the principal applicant, he worked at a psychiatric hospital as a laboratory technician in Mexico. On February 28, 2006, while out for a walk in the park with his family, he was beaten and robbed by three individuals. He recognized one of his attackers, a police officer named Enrique Garcia, better known as El Gato.

[5] The applicant went to the Office of the Public Prosecutor to report the incident that same day. He was intercepted by three police officers who took him by force to an isolated place. They told him not to file a complaint against El Gato because he worked for the police as a “madrina” (someone who does the police’s dirty work). They also threatened the applicant and his family with reprisals if he made another complaint.

[6] On June 3, 2006, the applicant was forced to go with three men to meet with El Gato, who wanted information on dates that cocaine was to arrive at the psychiatric hospital where he was working. El Gato warned him not to contact the police.

[7] The applicant did not comply with El Gato's request for information on drug shipments; instead, he quit his job and went to live with his family in the city of Cuernavaca Morelos.

[8] On June 8, 2006, El Gato located the applicant, threatened him with a gun and gave him 30 days to provide the information he was looking for. So the applicant fled to Tlalpan, where he went about getting passports; he ultimately left Mexico for Canada by himself on June 10, 2006.

[9] The applicant's spouse went with their daughter to live with an aunt. On September 10, 2006, she was accosted by El Gato, who asked where her husband was. He slapped her in the face and attempted to abduct her daughter. When she started shouting, El Gato let go but continued to threaten. So she decided to leave Mexico and join her husband in Canada on September 13, 2006.

II. Impugned Decision

[10] The Panel identified some contradictions between the applicants' testimony at the hearing and their Personal Information Forms (PIFs), particularly with respect to when they recognized El Gato, when they moved in June 2006 and where the June 3, 2006 attack occurred. The Panel found that these contradictions undermined the applicants' credibility.

[11] That said, the main issue for the Panel was state protection. In his testimony, the principal applicant said he was told by the three police officers who intercepted him on March 1, 2006, that El Gato worked for the police; this was after he had filed his report. However, the report indicates quite clearly that the applicant recognized one of his three attackers, Enrique Garcia, alias El Gato, because he was a judicial police officer. When confronted with that contradiction, the applicant gave an explanation that the Panel found inconsistent with the complaint.

[12] The Panel considered the fact that the applicant's spouse did not report the alleged attack on her on September 10, 2006, to the authorities. It also drew an adverse inference from the applicant's failure to report the police officers' treatment of him when he went to file a report on March 1, 2006. Finally, the Panel noted that the applicant did not inform the Mexican authorities or his employer about El Gato's attempts to get drugs through him.

[13] After reviewing the documentary evidence, the Panel found that recourse was available to the victims of corrupt police officers, and determined that the applicants had failed to rebut the presumption that the Mexican authorities were able to protect them.

III. Issue

[14] The only issue in this judicial review application is whether the Panel erred in finding that the applicants failed to rebut the presumption of state protection.

IV. Analysis

[15] Prior to the Supreme Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, it was settled law that the appropriate standard of review for a decision on an issue of this nature was reasonableness: see, for example, *Chaves v. Canada (MCI)*, 2005 FC 193, 45 Imm. L.R. (3d) 58; *Muszynski v. Canada (MCI)*, 2005 FC 1075, 141 A.C.W.S. (3d) 620; *Franklyn v. Canada (MCI)*, 2005 FC 1249, 142 A.C.W.S. (3d) 308. In *Dunsmuir*, the Supreme Court not only brought down the number of applicable review standards from three to two, it also indicated that there was no need to analyse the various factors that determine the proper standard of review when that exercise has already been conducted in a satisfactory manner in other decisions.

[16] On that basis, and considering that the issue of whether a state is able to protect its citizens is a question of mixed fact and law, the Court has no hesitation in finding that this issue must be examined against the reasonableness standard. That is, in fact, the standard this Court has repeatedly applied since the Supreme Court's decision in *Dunsmuir*: see, *inter alia*, *Da Mota v. Canada (MCI)*, 2008 FC 386, 166 A.C.W.S. (3d) 552, at paragraph 14; *Obeid v. Canada (MCI)*, 2008 FC 503, 167 A.C.W.S. (3d) 373; *Naumets v. Canada (MCI)*, 2008 FC 522, 167 A.C.W.S. (3d) 147; *Woods v. Canada (MCI)*, 2008 FC 446, 166 A.C.W.S. (3d) 551, at paragraph 32; *Mendez v. Canada (MCI)*, 2008 FC 584, [2008] F.C.J. No. 771 (QL).

[17] It could well be that the Panel jumped to some slightly hasty conclusions in finding that there was a contradiction between the principal applicant's testimony and his PIF over when he identified his attacker. Mr. Martell did explain that his family had told him that El Gato was a judicial police officer, so he included that in his report to the Office of the Public Prosecutor. What he learned from the police officers who subsequently intercepted him and threatened him was that

El Gato was a “madrina”. There is no contradiction there that would allow the Panel to make an adverse credibility finding with respect to the applicant.

[18] The same goes for the apparent contradiction between his PIF, in which he said he went to the authorities to file a complaint on March 1, 2006, and the report dated February 28, 2006. The Panel mentioned in its decision that the applicant was not confronted with this contradiction. However, the applicant indicated in his affidavit that he went to the Office of the Public Prosecutor to file a report on February 28 at 10 o’clock at night, and did not leave until March 1st because he had to wait so long for them to take his complaint.

[19] The Court is therefore prepared to admit that the Panel did not really give the applicant the chance to explain, and when it did, it misinterpreted what he said. That said, these errors in assessing the principal applicant’s credibility were not decisive, and do not affect the applicants’ failure to rebut the presumption of state protection.

[20] In support of its finding that the applicants did not sufficiently avail themselves of the protection available from Mexican authorities, the Panel took into account the fact that the applicant’s spouse did not report the alleged attack on her on September 10, 2006, to the authorities. It also noted that the principal applicant did not report his interception by police officers on March 1, 2006, and did not inform the Mexican authorities or his employer about El Gato’s attempts to get drugs through him.

[21] The Panel indicated that drug trafficking, abductions and police corruption were serious problems in Mexico. At the same time, however, it pointed out that results were being achieved,

with drug dealers and corrupt police officers and government officials being apprehended, charged and convicted. The Panel also mentioned that organizations funded by the Mexican government had been set up to assist people having difficulty obtaining state protection. With recourse available specifically for that type of problem, the Panel found that it was not unreasonable to expect the applicants to avail themselves of the protection that the Mexican authorities were capable of providing.

[22] The applicants also argued that the Panel ignored documents filed in evidence. It should be pointed out that there is a presumption to the effect that the Panel is deemed to have considered all of the evidence before making its decision, despite the fact that not all of the various pieces of evidence are specifically mentioned in its reasons. It is up to the Panel to weigh the evidence before it and to make the appropriate findings. In so doing, the Panel may choose from among the evidence as it sees fit, and this choice is an integral part of its role and expertise: *Mahendran v. Canada (MCI)*, (1991) 134 N.R. 316, 14 Imm. L.R. (2d) 30 (F.C.A.); *Tawfik v. Canada (MCI)* (1993), 137 F.T.R. 43, 26 Imm. L.R. (2d) 148; *Akinlolu v. Canada (MCI)* (1997), 70 A.C.W.S. (3d) 136, [1997] F.C.J. No. 296 (QL); *Florea v. Canada (MEI)*, [1993] F.C.J. No. 598 (C.A.) (QL).

[23] Furthermore, this Court has repeatedly held that the conduct of some police officers does not obviate the need to seek protection from the authorities because that is not sufficient proof of the state's inability to protect its citizens. This Court established in *De Baez v. Canada (MCI*), 2003 FCTD 785, 236 F.T.R. 148, that the actions of some police officers do not obviate the need to seek protection from the authorities:

> [14] In the present case, the applicants never attempted to report their concerns to the police. They say that the police were part of Pablo's problem, so it is unreasonable to expect him to seek protection from the police.

> [15] However, in *Kadenko v. Canada (Solicitor General)* (1996) 143 D.L.R. (4th) 532 (F.C.A.) the Federal Court of the Appeal expressed the obligation on a applicant in the following terms:
>
> > When the state in question is a democratic state, as in 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. …
>
> [16] Thus, the actions of some police officers does not obviate the need to seek protection from the authorities. Discrimination by some police officers is not sufficient proof of the state's unwillingness to provide, or inability on the part of the applicants, to seek protection.

See also, in the same vein: *Garcia Villasenor v. Canada (MCI)*, 2006 FC 1080, 157 A.C.W.S. (3d) 818.

[24] Although in agreement with the applicants on the Panel's errors of interpretation and understanding, the Court does not consider unreasonable, in light of the documentary evidence, the Panel's finding that they failed to rebut the presumption of state protection. Therefore, the Panel's errors with respect to their credibility do not affect its finding that Mexico was capable of protecting them.

[25] For these reasons, I would dismiss the application for judicial review. The parties did not submit any questions for certification.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Yves de Montigny"
Judge

Certified true translation

Peter Douglas

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4434-07
STYLE OF CAUSE:	Jose Alfredo Xocopa Martell et al. **v.** MCI
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	June 27, 2008
REASONS FOR JUDGMENT AND JUDGMENT BY:	Justice de Montigny
DATE OF REASONS:	September 16, 2008

APPEARANCES:

Jose Alfredo Xocopa Martell (representing himself)	FOR THE APPLICANT, JOSE ALFREDO XOCOPA MARTELL
Mireille Rainville	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Unrepresented	FOR THE APPLICANTS
John H. Sims Deputy Attorney General of Canada	FOR THE RESPONDENT