Date: 20081222

Docket: IMM-1790-08

Citation: 2008 FC 1384

Ottawa, Ontario, December 22, 2008

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

Cesar Horacio TOVAR VALERA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, of a decision by the Refugee Protection Division (the RPD) of the Immigration and Refugee Board, dated March 27, 2008.

[2] Cesar Horacio Tovar Valera (the applicant) is a citizen of Peru and a member of the folk music group *Chopkjas*.

[3] The RPD refused the refugee claim for two reasons: the applicant (1) did not discharge his onus concerning the state's inability to protect him and (2) waited too long before claiming refugee status.

[4] On the issue of state protection, the appropriate standard of review is reasonableness (see, *inter alia*, *Gorria v. Minister of Citizenship and Immigration*, 2007 FC 284, 310 F.T.R. 150, at paragraph 14 and *Chaves v. Minister of Citizenship and Immigration*, 2005 FC 193, at paragraphs 9 to 12).

[5] To demonstrate that the state is unable to protect its nationals and that an applicant's refusal to genuinely solicit this protection is reasonable, he or she must "provide clear and convincing confirmation of a state's inability to protect" (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at page 724). Without this evidence, the claim must fail because of the presumption that nations are capable of protecting their citizens.

[6] On the one hand, the applicant submits that he clearly established Peru's inability to protect him because the agent of persecution is the state. He says that he fears the APRA (*Allianza Populár Revolucionaria Americana*), which is the party in power. He concludes that he would be unable to obtain the protection of the state against its own leaders.

[7] The respondent submits that the documentary evidence cited by the panel indicates that Peru is a multi-party republic and that even though APRA won the elections, it cannot be argued that mere members of this party can be considered to be the Peruvian state. I concur. It is clear, in the

particular circumstances of Peru, that APRA members do not themselves constitute the Peruvian state. The documentary evidence enabled the panel to reasonably conclude as it did on this point.

[8] Moreover, it is clear from the *Ward* decision, above, that "persecution under the Convention includes situations where the state is not in strictness an accomplice to the persecution, but is simply unable to protect its citizens." It is therefore not necessary that the applicant prove that APRA members constitute the Peruvian state; he need only demonstrate that the state—the police, for example—is unable to protect him from private persecution.

[9] This is not a case where the applicant failed to file a report with the police. However, the panel doubted the adequacy of the applicant's efforts in seeking the state's assistance. In *Kadenko et al. v. Canada (Solicitor General)* (1996), 206 N.R. 272, the Federal Court of Appeal set out the principle that applies in this case:

> [3]. . . Once it is assumed that the state (Israel in this case) has political and judicial institutions capable of protecting its citizens, it is clear that the refusal of certain police officers to take action cannot in itself make the state incapable of doing so. The answer might have been different if the question had related, for example, to the refusal by the police as an institution or to a more or less general refusal by the police force to provide the protection conferred by the country's political and judicial institutions.
>
> . . .
>
> [5] 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. . . .

[10] It is important to note that the applicant's first "complaint" to the police on June 30, 2006, was, in fact, only a [TRANSLATION] "consultation". Moreover, it was only two days after the second

complaint, filed on July 29, 2006, that the applicant left Peru for Canada. Accordingly, the state did not have much time to prove its ability to protect him.

[11] Consequently, I am of the view that it was not unreasonable for the panel to determine that the applicant did not succeed in providing the "clear and convincing" evidence required to rebut the presumption that a country such as Peru is capable of protecting its citizens.

[12] On the issue of the applicant's delay in claiming refugee status, the panel wrote the following:

> In addition, the claimant not only failed to seek protection in his own country, he also failed to seek protection when he arrived in Canada. He arrived on August 1, 2006, and did not make his claim for refugee protection until November 1, 2006, three months after he arrived.
>
> The panel asked him to respond to this failure to claim refugee protection when he arrived in Canada.
>
> The claimant explained that his Canadian employer had instructed him not to claim refugee protection. He therefore waited until his engagement was over before doing so.
>
> This explanation is not satisfactory, given that the engagement was over on September 30, 2006, and the claim was not made until November 1, 2006.
>
> The Federal Court has already taken position on this in *Huerta* v. *Canada* ((M.E.I.) 1993, 157 N.R. 225 FCA, p. 227):
>
> The delay in making a claim to refugee status or in leaving a country of persecution is not a decisive factor in itself. It is, however, a relevant element which the tribunal may take into account in assessing both the statements and the actions and deeds of a claimant.

[13] Based on the evidence, in my view, the panel could reasonably determine that the applicant's conduct was inconsistent with any fear and that it tainted his credibility (see *Conte v. Minister of Citizenship and Immigration*, 2005 FC 963).

[14] For all these reasons, the application for judicial review is dismissed.

JUDGMENT

The application for judicial review of the decision by the Refugee Protection Division dated March 27, 2008, is dismissed.

"Yvon Pinard"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1790-08
STYLE OF CAUSE:	Cesar Horacio TOVAR VALERA v. MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 19, 2008
REASONS FOR JUDGMENT AND JUDGMENT BY:	Mr. Justice Pinard
DATED:	December 22, 2008

APPEARANCES:

Stéphanie Valois	FOR THE APPLICANT
Mario Blanchard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stéphanie Valois Montréal, Quebec	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT