Date: 20090609

Docket: IMM-4776-08

Citation: 2009 FC 610

OTTAWA, Ontario, June 9, 2009

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

JOSE CARLOS MARTINEZ GUTIERREZ
MARISOL HATZIN LOZA CASTILLO
CARLOS GAEL MARTINEZ LOZA
SOCORRO CASTILLO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Fearing reprisals from drug dealers for his refusal to traffic drugs at his place of employment, and following a series of ominous phone calls to his wife and the discovery that his young son had been sexually abused by another minor, Mr. Jose Carlos Martinez Gutierrez, together with Marisol Hatzin Loza Castillo (his wife), Carlos Gael Martinez Loza (his minor son), and Socorro Castillo (his mother-in-law), sought refugee protection in Canada. A panel of the Immigration and Refugee Board dismissed their claim, finding that they were neither Convention refugees nor persons in need of protection under section 96 or 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 ("IRPA"). The Board viewed the claimants as suffering from the

unfortunate effects of criminality, and that there was no nexus to a Convention refugee ground. Further, the Board found that there was adequate state protection available to the claimants.

[2] The Applicants argue that the Board erred in its assessment about the availability of state protection and failed to consider the cumulative effects of the various incidents on the Applicants. The Applicants applied for judicial review of the decision of the Board, and ask me to order another panel of the Board to reconsider their claim. However, I can find no basis to overturn the Board's decision and must, therefore, dismiss this application for judicial review for the reasons that follow.

I. Factual Background

[3] The Applicants are all citizens of Mexico. Mr. Gutierrez was working as a disc jockey in Veracruz when he was approached, on September 15, 2007, by two drug dealers who ordered him to sell drugs at the disco. When he did not answer, they threatened to harm or kill Mr. Gutierrez unless he complied. The drug dealers returned to the disco twice, but Mr. Gutierrez, with the help of his manager, was able to avoid them both times. On October 10, 2007, Mr. Gutierrez quit his job, citing his fear of the drug dealers.

[4] A short time after the drug dealers first approached Mr. Gutierrez, Ms. Loza Castillo began to receive anonymous phone calls. At first, no words were spoken. Soon, though, the calls became threatening: the speaker said that he knew who she was, where she lived, and where her husband

worked. The speaker asked for Mr. Gutierrez and stated that he must do what was asked of him, and made threats against the family.

[5] The Applicants reported the anonymous phone calls to the Mexican police around the beginning of October. They did not report that Mr. Gutierrez had been approached by drug dealers, even though they believed the phone calls were linked to his refusal to sell drugs at the disco. Three weeks later, the Applicants returned to the police and were told that they would have to wait for the investigation to be completed. Within a week, however, the Applicants fled to Canada.

[6] Mr. Gutierrez and Ms. Loza Castillo also fear for their young son. Ms. Loza Castillo discovered that Carlos, at the age of four, had been engaging in sexual touching and sexual acts with an eleven year-old boy and his cousin. Ms. Loza Castillo approached the older boy's mother, but was verbally abused and mocked. The older children had told Carlos not to tell anyone about the activities, which became a source of distress and guilt.

[7] Ms. Loza Castillo reported the circumstances to the Mexican police. She was told that an investigation would require Carlos to confront the older boy and tell his story to several people. She was also told that, due to the aggressor's age, the likely outcome would be no more than a referral to counselling. Rather than subject Carlos to the investigation process, Ms. Loza Castillo decided not to pursue the matter further.

[8] Finally, Ms. Castillo fears harm due to three encounters with drug-addicted criminals. Twice she was assaulted, and both times she was able to escape harm. The third time she was assisting to break up a fight when she was hit in the face. These events were apparently unrelated and occurred randomly over the course of Ms. Castillo's lifetime.

II. The Board's Decision

[9] The Board performed an analysis of the events based on section 96 and section 97 of IRPA. Under the section 96 analysis, the Board determined that the adult Applicants were not Convention refugees: the threats of harm emanate from a criminal source, not "on account of any of the Convention grounds" (Board's Decision, p. 2 and p. 3). Fear of persecution at the hands of unknown drug dealers or drug-addicted criminals does not bring the Applicants within section 96. The Board member concluded that the adult Applicants' fear "is not linked to race, nationality, religion, real or imputed political opinion or their membership in a particular social group. Therefore, I conclude that the claimants are simply victims of crime and this does not provide the claimants with a link to a Convention ground" (Board's Decision, p. 3).

[10] With regard to the minor child, the Board determined that, although Carlos had suffered serious harm, the presumption of state protection had not been rebutted by clear and convincing evidence. The Board observed that Mr. Loza Castillo did, in fact, report the incident to the police, and went on to point out, "While the claimant may not have liked or have been satisfied with the recourse available, the state was willing and able to provide services to help remedy the situation.

The claimant chose not to pursue the complaint … . [Ms. Loza Castillo] also obtained counseling for the minor claimant. While the decision not to pursue a complaint may have been frustrating, this does not present as a situation where state protection was not forthcoming" (Board's Decision, p. 5).

[11] The Board also asked, pursuant to section 97, whether the Applicants, on a balance of probabilities, would be subjected personally to a danger of torture, a risk to their lives or a risk of cruel and unusual treatment or punishment if they were to return to Mexico. The Board found that there was no objective basis for the Applicants' fear of drug dealers or drug-addicted criminals, and that it was more likely than not that the Applicants would not suffer any prospective harm.

[12] Further, the Board found that the Applicants had not rebutted the presumption of state protection. The analysis touched on documentary evidence from various sources, and referred to the "well-prepared representations" from counsel for the Applicants, including the exhortation to consider the "reality of protection" in practice (citing *Avila* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 359 at para. 27). While the Board acknowledged the ongoing challenges faced by the Mexican government as it combats the drug trade and its peripheral criminal effects, the Board found, "Despite the shortcomings, having considered the totality of the evidence, the panel determines that the Mexican authorities do offer adequate protection to victims of drug dealers" (Board's Decision, p. 10).

[13] The Board similarly found that the harm experienced by Carlos could be determined by the availability of state protection. In terms of Ms. Castillo's fears, the Board determined that she faced

a generalized risk of crime which is widespread in Mexico. The Board sympathized with Ms. Castillo, but found that she did not face "a personal risk … and therefore her claim under section 97 also fails. In any event, … she too, has access to adequate s[t]ate protection in Mexico" (Board Decision, p. 11).

III. Issues

[14] The Applicants raised several issues in their written submissions relating to the Board's interpretation and application of sections 96 and 97 of IRPA. They also argue that the Board made erroneous findings of fact in a capricious manner without regard for the material before it, and that the Refugee Protection Officer's participation at the Board hearing created procedural unfairness. In argument before me, the Applicants conceded that the Board's finding that there was no nexus to a Convention ground was correct. Thus, the remaining issues can be stated as follows:

1. Did the Refugee Protection Officer's participation in the hearing before the Board render the procedure unfair?
2. Did the Board err in its assessment of the risks faced by the Applicants by failing to consider their cumulative effect?
3. Did the Board err in finding that the Applicants failed to rebut the presumption of state protection?

IV. Standard of Review

[15] Reviewing courts owe no deference to the Board on questions of procedural fairness. If there has been a breach of procedural fairness, the Board's decision cannot stand.

[16] The same can be said of a determination of the cumulative effect of incidents and whether they give rise to a well founded fear of persecution. As the Federal Court of Appeal has recently held, "The question of whether the Board was required to consider the cumulative effect of incidents … is a question of law, to be determined on a standard of correctness" (*Munderere* v. *Canada (Minister of Citizenship and Immigration)*, 2008 FCA 84) (see also *Mete* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 840 at para. 6).

[17] On the issue of state protection, the onus is on the Applicants to rebut the presumption of state protection (*Canada (Attorney General)* v. *Ward*, [1993] 2 S.C.R. 689). It has long been established, both before and after the Supreme Court of Canada's decision in *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, that a reviewing court should not interfere with the Board's findings on the availability of state protection unless they are unreasonable (*Chavez* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 193; *Navarro* v. *Canada (Minister of Citizenship and Immigration)*, 2008 FC 358).

[18] The Supreme Court of Canada provided further guidance on how the reasonableness standard should be applied. Reasonableness is concerned with the existence of justification,

transparency and intelligibility within the decision-making process. Specifically, a decision must fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47).

V. Analysis

1. Did the Refugee Protection Officer's participation in the hearing before the Board render the procedure unfair?

[19] The Applicants submit that the Refugee Protection Officer ("RPO"), who was present at the hearing as a purportedly neutral participant, made submissions that were in fact clearly adverse to the Applicants' interests. The Respondent acknowledges that the RPO expressed some concerns about the credibility of some of the Applicants' evidence. However, the Respondent also cites examples of the RPO supporting the Applicants' claim, especially as it pertained to Carlos. The Respondent further points out that the RPO was not the decision-maker in this case, and that the Applicants' reliance on *Benitez* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 at para. 63, is misplaced since the Court was commenting not on the input of the RPO, but on the order of questioning, which was not an issue in this case.

[20] Having reviewed the transcript of the proceedings before the Board, I can see no basis for finding that the participation of the RPO rendered the process unfair. The RPO participated in the

hearing in a way that respected and protected the procedural safeguards available to the Applicants. Her comments were, on the whole, in keeping with her role.

2. Did the Board err in its assessment of the risks faced by the Applicants by failing to consider their cumulative effect?

[21] The Applicants submit that the Board correctly identified three bases for their claims, but they argue that the Board proceeded to consider and analyze the incidents only in isolation. They argue that this is a reviewable error. The Respondent does not specifically respond to the Applicant's argument; rather, he made detailed arguments defending the Board's findings generally, which I will not summarize in their entirety.

[22] In its section 96 analysis, the Board notes the three sets of circumstances put forward by the Applicants, and identifies the determinative issue for each (Board Decision, p. 2). Similarly, in undertaking an analysis pursuant to section 97, the Board notes, "As above, the analysis under this section is based on three set[s] of circumstances" and proceeds to identify the determinative issue for each (Board Decision, p. 6). This is the wording with which the Applicants take issue. They maintain that it reflects an approach that considers the events only in isolation, and precludes a holistic analysis that would account for the cumulative effect of the Applicants' experiences.

[23] The Federal Court of Appeal provides guidance on this issue. In *Munderere*, above, the Honourable Justice Marc Nadon, writing for the Court, stated:

> [T]he Board is duty bound to consider all of the events which may have an impact on a claimant's claim that he or she has a well founded fear of persecution, including those events which, if taken individually, do not amount to persecution, but if taken together, may justify a claim to a well founded fear of persecution. (At para. 42.)

[24] It is true that the Board never used the phrase "cumulative effect" or "cumulative grounds". The true question, however, is whether the Board considered such a concept even if it did not use the terminology. The Board thoroughly reviewed the various aspects of the Applicants' claims, and recognized that some of the events may have been interrelated. For example, the Board was clearly concerned with timelines, such as when and what the Applicants reported incidents to the police, and also notes that the attacks on Ms. Socorro occurred over the course of a lifetime; the Board also reflected on the sexual touching suffered by Carlos, and made findings as to their current and prospective effect on him, given the support he received from his family and the possibilities available in Mexico for treatment.

[25] I am mindful of the high standard established by the Federal Court of Appeal with regard to the Board's analysis of the cumulative effects of refugee claimants' experiences: it must be more than a reasonable assessment of the circumstances – it must be correct. In this case, I am satisfied that the Board was, in fact, mindful of all aspects of the Applicants' various claims, how they had impacted them, and how they might affect the Applicants should they return to Mexico. The Board's failure to couch the analysis in terms of a "cumulative" approach does not betray an incorrect analysis. The Board clearly considered all of the events described by the Applicants, both individually and as a group. I can see no basis, therefore, for overturning the Board's decision on these grounds.

3. Did the Board err in finding that the Applicants failed to rebut the presumption of state protection?

[26] The Applicants submit that the Board erred in its assessment of the evidence before it, much of it provided by the Applicants in the form of documentation about conditions in Mexico. They argue that the Board ignored and/or misinterpreted evidence to such a degree that the findings, including those on the availability and effectiveness of state protection, were unreasonable. The Respondent emphasizes the weight of judicial authority behind the proposition that, absent a complete breakdown of the state apparatus, it is presumed that the state is capable of providing effective protection (e.g., *Ward*, above). The Respondent maintains that the Applicants have not adduced the clear and convincing evidence required to rebut this presumption.

[27] The Board is presumed to have considered all the evidence unless the contrary is shown; further, a failure to refer to some evidence does not necessarily signify that it was not considered (see *Florea* v. *Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (C.A.); *Ortiz* v. *Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1163; *Ali* v. *Canada (Minister of Citizenship and Immigration)*, 2003 FCT 242). However, when there is important contradictory evidence, it must be discussed (*Cepeda-Gutierrez* v. *Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 at para. 17; *Babai* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 1341).

[28] Both before and at the hearing before the Board, counsel for the Applicants produced documentation outlining the difficult social conditions in Mexico, including the prevalence of organized crime, the infiltration of certain police forces by nefarious elements, and the rampant intimidation of ordinary citizens. The Board's decision specifically discusses the evidence produced by counsel for the Applicants (Board Decision, p. 10), as well as the documentary evidence gleaned from other reliable sources. The Board then specifically outlines its reasons for finding that, despite contradictory evidence on the issue, the Mexican government and authorities are capable of providing effective protection. For example, the Board cites increases in the number of investigations in Mexico aimed at stemming corruption of federal employees; increased military expenditures aimed at fighting drug related crime; and the possibility that some increases in violence actually show that government strategies to combat the drug trade are working, as they signal cartels' destabilization. The Board states that it has – and, indeed, seems to have – considered "the totality of the evidence" before it (Board's Decision, p. 10).

[29] The Board also points out that the Applicants did, in fact, bring their concerns to the police. In the matter of the anonymous phone calls, they left the country before the investigation could be completed; in the matter of the sexual touching suffered by Carlos, the state was prepared to act but the Applicants decided not to avail themselves of the protective measures available.

[30] The Board's finding on the availability of state protection to all the Applicants, regardless of their circumstances, is reasonable, and I see no reason to interfere with it.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed.

No question of general importance was submitted for certification.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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