

Federal Court



Cour fédérale

**Date: 20100304**

**Docket: IMM-2831-09**

**Citation: 2010 FC 249**

**Ottawa, Ontario, March 4, 2010**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**GILBERTO VALDEZ CASTRO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant asks the Court to review and set aside a decision by the Refugee Protection Division of the Immigration and Refugee Board, which determined that he was not a person in need of protection within the meaning of section 97 of the *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27.

[2] The determinative issue was whether the applicant had made adequate efforts to seek state protection prior to availing himself of refugee protection, and whether these efforts had rebutted the presumption of state protection. For the reasons that follow, this application is dismissed.

### **Background**

[3] Gilberto Valdez Castro is a citizen of Mexico. His fear stems from the fall-out of an illegal immigration scam that he unwittingly helped to perpetrate.

[4] He was approached by a company to recruit would be emigrants to the U.S.A. with the prospect of obtaining a work visa. He was to be paid 1500 Pesos per week and a further 50 Pesos per recruit. In turn, the recruits were required to provide their passports to the company, accompanied by a US\$650 fee.

[5] Mr. Valdez Castro recruited 129 people. Among the 129 were six people whose passports were suspicious because they were submitted twice with the same photos, but with different personal details. Mr. Valdez Castro made an anonymous report of his suspicions to the police.

[6] The company never provided work visas and disappeared with the recruits' money. Mr. Valdez Castro states that the defrauded individuals, and in particular the six who submitted suspicious passports, became angry and started threatening him.

[7] On November 20, 2006, the six men showed up at his office and demanded repayment of their money and the return of their passports. The men made it known that they were associated with Vicente Carrillo Fuentes, allegedly one of the narco-trafficking families in Mexico. Mr. Valdez Castro was threatened with death if he did not return the passports and money.

[8] Two days later, three of the six men returned to Mr. Valdez Castro's office, this time armed. They made similar threats and told him that they were aware he had reported their suspicious passports to the authorities. Mr. Valdez Castro states that he made a police report about this incident, but received no follow-up.

[9] On November 30, 2006, the six men returned to collect their passports. The men again threatened Mr. Valdez Castro if their money was not also returned. Mr. Valdez Castro states that after this incident he noticed that he was being followed and watched.

[10] Out of fear, Mr. Valdez Castro and his family relocated to Culiacan, a larger city, hoping to escape the six but this relocation proved unsuccessful. Mr. Valdez Castro states that he was again being followed as of April 2007 and that his house was shot at in May 2007. He went to the police but received no protection, and the next day he again relocated, this time to Jalisco.

[11] Mr. Valdez Castro states that in Jalisco, on March 2, 2008, one of the six attempted to run him off the road. He did not report this incident to the police, but instead fled to Canada, arriving on March 19, 2008. He filed a claim for refugee protection on April 3, 2008.

[12] The Board began by noting that as his fear was due to criminal acts already perpetrated or which would be perpetrated against him, his claim would only be analyzed under s. 97 of the Act.

[13] The Board reviewed the applicant's allegations of violence and noted that he had moved within Mexico to avoid further violence. The Board also noted the efforts the applicant had made to seek state protection, his allegations of non-response by the authorities, and the fact that the applicant did not report every incident to the police. The Board found that the applicant:

...had the experience to engage authorities at different levels; he could have reported those individuals to the local authorities where the incidents took place. ... If a claimant believes that the actions of some police officers are corrupt, the onus is on him or her to approach other members of the security forces or authorities. He chose not to engage the authorities in Culiacan and Acatlan de Juarez. ... No evidence was advanced to show that the authorities in Culiacan and Acatlan de Juarez were unable or unwilling to help him.

[emphasis added]

[14] The Board reviewed the police structure in Mexico, and the options that the applicant could have pursued if he thought that the lack of effectiveness of the police response to his complaints was as a consequence of corruption. The Board acknowledged that Mexico suffers from ongoing corruption issues, but went on to conclude that the Mexican government are taking steps to address these issues. The Board also reviewed the efforts that Mexico is taking to address its narco-trafficking problem.

[15] The Board concluded that adequate, though not necessarily perfect, state protection was available to the applicant in Mexico and that he had not discharged the onus of providing clear and convincing evidence to rebut the presumption of state protection.

[16] The Board cited the two-pronged internal flight alternative (IFA) test from *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (C.A.). The Board noted that Mexico City would provide the applicant with even more protective options should he be pursued by his assailants and not be satisfied with the protective response of the local authorities. The Board concluded that state protection would be available to the applicant in Mexico City and that based on his education and employment history it would be reasonable for the applicant to avail himself of this IFA.

[17] Consequently, the Board determined that the applicant was neither a Convention refugee nor person in need of protection.

### **Issues**

[18] The applicant raises two issues:

1. Whether the Board's decision that there is adequate state protection available to the applicant against the threat of death at the hands of Vicente Carrillo Fuentes based on a misunderstanding of the facts and a selective reading of the documentary evidence; and

2. Whether the Board's decision that Mexico City represents a viable internal flight alternative was based on a misunderstanding of the facts as they relate to the steps that the applicant took to protect himself in Mexico and, in any event, was otherwise unreasonable.

*1. State Protection Finding*

[19] The applicant submits that the Board's conclusion is flawed because (i) the Board mistakenly determined that the applicant failed to approach authorities in an instance where in fact he had, (ii) the Board failed to consider documentary evidence that suggested complaints about corrupt or inefficient police would go nowhere, and (iii) the Board failed to consider documentary evidence that suggested the Mexican government's efforts to combat drug cartels had been largely unsuccessful.

[20] The respondent submits that the applicant is inappropriately asking this Court to reweigh the evidence as to whether he rebutted the presumption of state protection. The respondent submits that specialized administrative tribunals should be given deference in their weighing of evidence:

*Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paras. 61, 62 and 66.

The respondent says that the Board reasonably assessed the avenues of potential protection available to the applicant as well as the Mexican state's efforts to combat drug cartels, and that this Court should not interfere with the Board's determinations.

[21] The respondent further submits that for a factual determination to result in a reviewable error, it must be erroneous and made in a capricious manner or without regard to the evidence, and the decision must be based on this error; the respondent contends that these condition precedents are not met in this case.

[22] For the reasons that follow, I agree with the respondent that the applicant's second and third submissions, as set out in paragraph 19 above, are submissions that this Court should reweigh the evidence that was before the Board. That is not the function of a court on judicial review.

[23] The Board provided a detailed discussion of the threats and violence that the applicant faced in Mexico and the circumstances that led to these threats and violence. The Board also noted the profile of the attackers and their alleged link to one of Mexico's notorious drug cartels. The Board considered the authorities' responses to the applicant's complaints. The Board also reviewed the options that existed if the applicant thought that the police response was ineffective and the Board reviewed the efforts that the Mexican state has taken to combat the drug cartels.

[24] In short, there is no evidence that the Board ignored or failed to consider any of the documentary evidence the applicant submitted or relied upon. A different decision-maker may have reached a different conclusion on this evidence but the decision cannot be set aside on the basis submitted by the applicant because it is "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law:" *Dunsmuir v. New Brunswick*, 2009 SCC 9, para 47.

[25] More troubling is that the Board did err in stating the applicant had not filed a complaint with the police following the alleged shooting incident into his house. While he did not go to the police after the incident in Acatlan de Juarez, he did after the incident in Caliacan. Accordingly, the Board got the facts wrong in this one aspect of the case. The Board's statement that the applicant had not sought police protection in that instance was erroneous and made without regard to the evidence.

[26] However, in order to set the decision aside on this basis, I must be satisfied that this erroneous factual finding was material to the outcome the Board reached. In this case, I am of the view that the factual finding was not material to the decision. The Board, as noted previously, examined the failings of the police with respect to allegations involving members of the drug cartels and noted that mechanisms were in place to deal with corrupt officials. In this case, the Board noted that if local corrupt officials were ineffectual other avenues of complaint were available to the applicant. That being so, I cannot conclude that the Board's determination on state protection would have differed had it noted that there had been a complaint to the police in Culiacan but that it was ineffectual. In short, I am of the view that the Board would not have reached a different conclusion if it had gotten this factual determination correct. Accordingly, this factual error does not constitute a reviewable error.

## *2. Internal Flight Alternative*



[27] The applicant argues that the Board's conclusion is unreasonable because it is based on its state protection conclusion, which he has argued is unreasonable.

[28] While the Board does state in passing that it is unlikely that the applicant's attackers would follow him to Mexico City, the Board's substantive conclusion rests on its state protection finding. The applicant's attackers had already shown their ability and intention to track him to various locations within Mexico. However, as discussed, the Board's conclusion regarding the applicant's failure to rebut the presumption of state protection is not unreasonable. The conclusion, in this case, is equally transferable to Mexico City. Consequently, the Board's conclusion regarding the availability of an IFA in Mexico City is also not unreasonable.

[29] Neither party proposed a question for certification and in my view there is none.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. This application for judicial review is dismissed; and
2. No question is certified.

"Russel W. Zinn"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2831-09

**STYLE OF CAUSE:** GILBERTO VALDEZ CASTRO v.  
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** February 23, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT:** ZINN J.

**DATED:** March 4, 2010

**APPEARANCES:**

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