Federal Court  Cour fédérale

Date: 20101117

Docket: IMM-997-10

Citation: 2010 FC 1115

Ottawa, Ontario, this 17th day of November 2010

Before: The Honourable Mr. Justice Pinard

BETWEEN:

ROLANDO ANGEL SILVA FUENTES
ORLANDO SILVA FUENTES

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of a member of the Refugee Protection Division of the Immigration and Refugee Board (the "Board"), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the "Act") by Rolando Angel Silva Fuentes and Orlando Silva Fuentes (the "applicants"). The Board determined that the applicants were neither Convention refugees nor persons in need of protection under sections 96 and 97 of the Act.

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[2] The applicants are Mexican citizens, from a border town in the north of Mexico. Both were police officers prior to their departure from Mexico.

[3] The principal applicant, Rolando, became a traffic police officer in 2001. In the summer of that year, as part of a drug investigation, he prevented a vehicle from entering the investigation area. The vehicle was driven by members of Los Zetas, a well-known criminal organization. This action angered a gang member known as Balderas, who was present. Two months later, a car owned by Los Zetas was being held and searched, and Balderas telephoned the station demanding the release of the car. When his demand was refused, he came to the station and, upon recognizing the principal applicant, threatened to kill him.

[4] Balderas went to the south of Mexico for several years, and in the meantime the principal applicant became a member of the tourist police. The principal applicant was approached several times over the years to join the cartel, but refused each time. In mid-2006, the applicant heard from a friend that Balderas had returned to the north, and had risen in the ranks of Los Zetas. The friend informed the applicant that Balderas wanted to kill him.

[5] In October 2006, the other applicant, Orlando, was abducted by cartel members, questioned about the principal applicant's involvement with military intelligence and US authorities, and assaulted and threatened. Following his release, both applicants went into hiding for several months. The principal applicant's common-law wife and children went to Texas, but the principal applicant

alleges that he did not follow them because of his knowledge that cartel members operate in Texas as well. The applicants came to Canada on June 1, 2007, and claimed refugee status on June 15, 2007.

[6] The refugee hearing was held on December 11, 2009. The principal applicant testified, and the other applicant relied on the principal applicant's testimony. At the conclusion of the hearing, the Tribunal Officer recommended that the applicants' claim be allowed. The Board's negative decision was rendered January 12, 2010, and received by the applicants on February 1, 2010.

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[7] The Board found that the determinative issues in this case were the existence of an internal flight alternative in Mexico City, and in the alternative, the existence of adequate state protection in Mexico.

A. *Internal flight alternative*

[8] The applicants submit that the Board ignored evidence that they would be pursued to Mexico City by Balderas. The applicants note that the principal applicant's Personal Information Form states that prior to 2006, Balderas did not have sufficient authority within Los Zetas to order the death of the applicant, but that by 2006, upon his return to the north, he had risen in the organization's ranks, and did have this authority. The applicants argue therefore that the Board's statement that Balderas was unlikely to pursue them because he had not done so in the intervening years was made without reference to this testimony. The applicants also argue that the Board

reached its decision without reference to the extensive power of Los Zetas, which could be used to pursue the applicants in Mexico City. The applicants cite *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 (T.D.), at paragraph 17, for the proposition that the Board errs where it ignores relevant evidence contradicting its conclusion and fails to explain why this evidence was not accepted. Here, the Board made no reference to this portion of the evidence at all. The applicants note that they were clearly being pursued in 2006, following Balderas' return to the north, as it was at this point that the principal applicant learned of the threat against him, and that the secondary applicant was interrogated and assaulted. The principal applicant also submits that his personal history of refusing to join Los Zetas is relevant, and was ignored by the Board.

[9] The respondent maintains that the Board's conclusion on an internal flight alternative in Mexico City was within the range of possible acceptable outcomes mandated by *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. The respondent argues that the applicants must provide "actual and concrete evidence" of the existence of dangerous conditions in Mexico City, as per *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 164 (C.A.), at paragraph 15. The respondent also submits that the Board is presumed to have taken into account all of the evidence, whether or not it says it has done so, as per *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (C.A.), paragraph 1, and that the reasons given here demonstrate that the Board did consider the totality of the evidence.

[10] The applicants accept the general presumption articulated in *Florea*, *supra*, but counter that this presumption does not cure the failure to refer to evidence that was highly relevant and directly

contradicted the Board's conclusions, namely the testimony and documentation on the power of Los Zetas.

[11] The applicants argue that the Board's decision on the existence of an internal flight alternative was also unreasonable given the documentary and testimonial evidence of corruption and infiltration of the Mexican state authorities by the drug cartels. The applicants cite several documents within the documentary package that describe the levels of corruption and cartel infiltration within federal, state and local law enforcement. The applicants note that the Board did not refer to any of this evidence, which contradicts its conclusion that the applicants would be safe in Mexico City. They submit that the Board again failed to assess the contradictory evidence and justify its exclusion, and they point not only to the documentary evidence but to the principal applicant's testimony that the applicants could be tracked down via the social security number database. The Board discussed the voter registration system, but not the social security database, and the applicants submit that the fact that the system is not meant to be accessible to outsiders, as the Board stated in its reasons, is a meaningless conclusion in the face of evidence of extensive corruption.

[12] In my opinion, the Board's finding of an internal flight alternative was unreasonable in light of its failure to address the evidence concerning the growing reach of Balderas and of Los Zetas. I agree with the applicants that the Board's reasoning that Balderas would not pursue them to Mexico City because he had not pursued them between 2001 and 2006 was unreasonable given the evidence presented, and the fact that he clearly had pursued them subsequent to his return in 2006. In my opinion, the applicants' personal history of standing up to the cartel and their testimony (the

credibility of which was not put into question) regarding the reach of Balderas and Los Zetas constituted “actual and concrete evidence” that should have been dealt with by the Board in its reasons. As the Board did not do so, I find its decision unreasonable.

[13] The respondent also submits that the Board’s decision was reasonable in light of the fact that there was no evidence that Balderas had attempted to use the voter registry to track the applicants, nor that he had attempted to track the principal applicant’s family in Texas. I agree with the applicants that this submission cannot be accepted, as the Board member made no such finding in his decision. According to *Xiao v. Canada (Minister of Citizenship and Immigration)*, [2009] 4 F.C.R. 510, at paragraph 35, “it is trite law that counsel for the respondent cannot supplement the reasons given by the decision maker”.

B. *State protection*

[14] The applicants also argue that the Board’s conclusion on state protection was unreasonable. The applicants submit that again the Board failed to refer to contradictory evidence and to address the rejection of such evidence. The applicants cite *Bautista v. Minister of Citizenship and Immigration*, 2010 FC 126, where Justice Michel Beaudry held:

> [10] I believe that the Board erred on two grounds in coming to its finding. First of all, it weighed the evidence of criticisms of the effectiveness of the legislation against evidence on the efforts made to address the problems of domestic violence. This is not enough to ground a finding of state protection; regard must be given to what is actually happening and not what the state is endeavoring to put in place . . .
>
> [11] Secondly, although the Board does acknowledge the contradictory evidence, it does not truly address the reasons why it considers it to be irrelevant . . .

[15] The applicants submit that the Board did the same thing in the present case. They point to numerous excerpts from the documentary evidence before the Board that make mention of widespread corruption and state that despite government efforts in the war against drug cartels, violence is increasing and security is deteriorating.

[16] Furthermore, the applicants contend that the Board's conclusion that Mexico is a democracy, and therefore that the claimant's onus to disprove the presumption of state protection is higher, was unreasonable in light of jurisprudence of this Court that has called Mexico a "developing democracy" and stated that "the presumption can be more easily overturned" (*De Leon v. Minister of Citizenship and Immigration*, 2007 FC 1307, paragraph 28; see also *Gilvaja v. Minister of Citizenship and Immigration*, 2009 FC 598, paragraph 43, and *Capitaine v. Minister of Citizenship and Immigration*, 2008 FC 98, paragraphs 20 to 22).

[17] The applicants also cite *Gilvaja*, *supra*, at paragraph 38:

> . . . the Board had a duty to explain why it preferred the evidence of the efforts the state is taking over the evidence that corruption and impunity continue to be a widespread and pervasive reality in Mexico. . . .

[18] The respondent argues that the excerpts of the documentary evidence cited by the applicants show that corruption exists and that state protection is not always effective or perfect, but that these conclusions were alluded to by the Board, and they do not necessarily contradict the Board's ultimate conclusion that the state would be reasonably forthcoming with serious efforts to protect the applicants. The respondent submits that the Board weighed the evidence of criminality and

corruption against the serious efforts of the Mexican government to combat these elements, and that it is not enough for the applicants to "refer to documentary evidence that, admittedly, paints a mixed picture about the state response", as per my colleague Justice Elizabeth Heneghan in *Palomares et al. v. The Minister of Citizenship and Immigration* (June 7, 2006), IMM-5447-05, at paragraph 12.

[19] The applicants argue that the Board's weighing of the documentary evidence was nevertheless unreasonable, as it relied exclusively on reports published in 2004 in order to make its finding regarding the state's "serious efforts", without adequate reference to more recent documents containing evidence of further corruption and the Mexican state's failed efforts to curb it. The applicants cite in particular a 2008 U.S. Department of State report stating:

> Corruption continued to be a problem, as many police, particularly at the state and local level, were involved in kidnapping, extortion, or providing protection for, or acting directly on behalf of, organized crime and drug trafficking. Impunity was pervasive and contributed to the continued reluctance of many victims to file complaints.

[20] The applicants also note that the Board listed several non-police organizations that it suggested could provide redress to the applicants. The applicants argue that the Board's reliance on these agencies was not supported by evidence demonstrating these agencies' effectiveness, contrary to *Avila v. Minister of Citizenship and Immigration*, 2006 FC 359, paragraph 33, and *Mendoza v. Minister of Citizenship and Immigration*, 2010 FC 119, paragraph 33. Furthermore, as the applicants note, the very institutions listed by the Board in its reasons were all rejected as constituting adequate state protection in *Zepeda v. Canada (Minister of Citizenship and Immigration)*, [2009] 1 F.C.R. 237, where Justice Danièle Tremblay-Lamer stated:

> [25] I am of the view that these alternate institutions do not constitute avenues of protection *per se*; unless there is evidence to the contrary, the police force is the only institution mandated with the protection of a nation's citizens and in possession of enforcement powers commensurate with this mandate. For example, the documentary evidence explicitly states that the National Human Rights Commission has no legal power of enforcement . . .

In light of this case, the existence of these agencies does not provide an alternative basis on which the Board could have founded its conclusion regarding state protection.

[21] On balance, in my opinion the Board's decision regarding the existence of state protection was unreasonable in light of the fact that it cited only evidence from 2004. While it is true that the Board stated that it had canvassed all of the evidence, and that it acknowledged that corruption continued to be a problem, in my opinion the Board set the onus on the applicants to disprove the presumption of state protection too high, and furthermore I find that the evidence cited by the applicants from the more recent reports contradicts the Board's findings to such a point that it should have been addressed. I find the above-cited excerpt from *Gilvaja* to be on point in this case.

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[22] For the above-mentioned reasons, the application for judicial review is allowed and the matter is referred back for redetermination by a newly constituted Board. No question is certified.

JUDGMENT

The application for judicial review is allowed. The decision of the Refugee Protection Division of the Immigration and Refugee Board, dated January 12, 2010, is set aside and the matter is referred back for redetermination by a newly constituted Board.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	ROLANDO ANGEL SILVA FUENTES, ORLANDO SILVA FUENTES v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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