

Federal Court



Cour fédérale

Date: 20110708

Docket: IMM-6368-10

Citation: 2011 FC 842

Ottawa, Ontario, July 8, 2011

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

JAVIER ELIZALDE ANDRADE

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Javier Elizalde Andrade [the Applicant], seeks judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board] dated October 6, 2010, wherein the Board determined that the Applicant is not a Convention refugee or person in need of protection [the Decision].

[2] For the following reasons, the application will be dismissed.

BACKGROUND

[3] The Applicant is a citizen of Mexico and a homosexual. As a young child, he was sexually abused by a family friend. Throughout his youth, he was also physically and emotionally abused by his family because of his sexuality. For this reason, he left the family home in 1993 at the age of fifteen.

[4] Thereafter, the Applicant began working as a toll booth cashier in Tepic, Mexico. He held that position from 1998 until 2007. During that time, he lived a stable, peaceful life and was able to live openly with a partner from 2004 to 2005.

[5] In 2007, an audit of the Applicant's workplace exposed irregularities in the receipts. These irregularities were caused by the Applicant's supervisor, who issued fraudulent receipts to cover up his theft from the toll booth system. The Applicant was warned by his supervisor not to say anything about this scheme and was told that his supervisor had friends in the federal police force.

[6] In November 2007, shortly after the audit, the Applicant decided to resign as a cashier. At the same time, he sent an anonymous letter to the head of his department to inform him of the supervisor's corruption. Although the letter was anonymous, the facts it disclosed showed that the Applicant was its author.

[7] In the period between January and March of 2008, several non-uniformed federal police officers began to harass the Applicant. On their first few visits, they took him into custody and

physically and verbally assaulted him, calling him “big mouth”. Each time he was taken into custody, the Applicant was released the same day or the next day after he paid the police officers a bribe. Later, although he was not taken into custody, the officers continued to harass the Applicant by coming to his home and demanding money.

[8] The Applicant fled Mexico for Canada on April 18, 2008. He claimed refugee protection on February 2, 2009 on the basis that he feared persecution by his family on the basis of his sexuality, and by his former supervisor and police officers as a result of his whistle-blowing.

THE DECISION

[9] The Board concluded that there was no objective basis for the Applicant’s fear of persecution at the hands of his family, as he had been away from the family home for over 15 years and no effort had been made to pursue him. This part of the Decision is not challenged in this application.

[10] Regarding the supervisor and the police, the Board accepted the Applicant’s evidence about the audit, his resignation and the subsequent extortion. However, the Board found that the Applicant had an internal flight alternative [IFA] in Mexico City.

[11] The Board concluded that there was no serious possibility that the Applicant would be pursued in Mexico City by his former supervisor or by the police officers.

THE EVIDENCE

[12] The Applicant claims that the Board ignored evidence he filed about the difficulty he would face in Mexico City as an openly homosexual individual.

[13] The first document dealt, in small part, with the experience of homosexuals in Mexico City. It was dated March 2010 and entitled *The Violations of the Rights of Lesbian, Gay Bisexual and Transgender Persons in Mexico – A Shadow Report* [the Report]. It was submitted to the Human Rights Committee of the United Nations by the following four organizations: Global Rights, International Gay and Lesbian Human Rights Commission, International Human Rights Clinic – Human Rights Program – Harvard Law School and Colectivo Binni Laanu A.C.

[14] The Report generally dealt with Mexico as a whole but did note that, in March 2010, same sex marriage would become legal in Mexico City and that “...most of the country lags far behind Mexico City in recognition of [Lesbian Gay Bisexual Transgender] rights”. It also noted that, unlike other parts of the country, Mexico City has hate crime legislation. This observation was followed by a statement that hate crimes may not be investigated and may be left unpunished, but this comment did not relate specifically to Mexico City. Again, speaking broadly, the Report concluded that “Individuals are vulnerable to hate crimes on grounds of their sexual orientation and gender identity, including hate-motivated killings.”

[15] The second document dealt with entirely with Mexico City. It was a two-page press bulletin dated July 28, 2007 [the Bulletin], which announced an upcoming series of public and private

hearings to enable victims of homophobia and hate crimes in Mexico City to denounce the crimes committed against them. The Bulletin reported that the City's ombudsman and a journalist said that, from 1995 to 2005, between 137 and 387 homophobically-motivated hate crimes, were committed in Mexico City and that 126 homosexuals were violently murdered.

THE ISSUE

[16] The question is whether, on the facts of this case, the Board was obliged to refer to the Report and the Bulletin when it proposed Mexico City as an IFA for an openly gay man.

THE STANDARD OF REVIEW

[17] The issue of whether a refugee claimant has an IFA is one of mixed fact and law, and is therefore reviewable on the reasonableness standard (see *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, 140 NR 148 (CA)).

DISCUSSION

[18] It is important to recall that the Applicant's claim for refugee protection was not premised on a fear of persecution because of his sexuality, except on the part of his family. Further, at the hearing, the Board asked the Applicant why he was afraid to go to Mexico City, and he replied that "...I fear Mexico City because there are a lot of kidnappings there and a lot of corruption." Notably,

he said nothing about being afraid because he is a homosexual. This makes sense because he had been openly living as a homosexual without problems for many years.

[19] In *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, 109 DLR (4th) 662, the Federal Court of Appeal said at paragraph 9 that, “If the possibility of an IFA is raised, the claimant must demonstrate on a balance of probabilities that there is a serious possibility of persecution in the area alleged to constitute an IFA.”

[20] The Report and the Bulletin were clearly filed to address this requirement. However, ultimately there was no evidence at the hearing to justify their filing because, although asked, the Applicant did not express a fear of persecution in Mexico City based on his sexual orientation.

CONCLUSION

[21] In these circumstances, there was no obligation on the Board to refer to the Report or the Bulletin.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed.

“Sandra J. Simpson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6368-10

STYLE OF CAUSE: Javier Elizalde Andrade v MCI

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: April 20, 2011

REASONS FOR JUDGMENT: SIMPSON J.

DATED: July 8, 2011

APPEARANCES:

Max Wolpert

FOR THE APPLICANT

Keith Reimer
Sarah-Dawn Norris

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michael Golden Law Corporation
Burnaby, British Columbia

FOR THE APPLICANT

Myles J. Kirvan
Deputy Attorney General of Canada

FOR THE RESPONDENT