Date: 20050208

Docket: IMM-603-04

Citation: 2005 FC 193

Ottawa, Ontario, February 8, 2005

Present: The Honourable Madam Justice Danièle Tremblay-Lamer

BETWEEN:

ALEJANDRO JOSE MARTINEZ CHAVES

Applica

nt

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Responden

t

REASONS FOR ORDER AND ORDER

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. c. 27 (the "Act"), for judicial review of a decision of the Refugeee Protection Division of the Immigration and Refugee Board (the "RPD"), wherein the RPD determined that the applicant was not a Convention refugee or person in need of protection according to sections 96 and 97 of the Act, respectively.

[2] The applicant is a 27-year-old citizen of Costa Rica, alleging that, in his home town of Puntarenas, he has been victimized by a wealthy businesswoman, Araceli Castillo Guerrero, who is thirty years his senior and who is very demanding and seeks his affection, and sexual favours. They carried on a brief secret relationship, and when the claimant tried to end the affair, he was harassed and physically abused by some local members of the Organization of Judicial Investigations ("OJI"), at the instigation of Araceli.

[3] In the first encounter, in October 2001, the claimant was beaten by two members of the OJI who warned him that he should return to Araceli. For the next six months approximately, he was regularly harassed, and occasionally roughed up by those two officers and others, and given the same advice.

[4] The claimant relocated to San Francisco Dos Rios in April 2002 and began working at a spa in that place. However, he was pursued by Araceli who visited the spa as a client, and that caused him to lose his job. He was perceived to be having a personal relationship with a client. Therefore, he moved to live and work in Panama where his mother was then residing after their business, *Kimbo Bar and Grill*, had been sold to Araceli.

[5] The claimant alleges that, while there, he learned that his twin brother in Costa Rica, had been beaten and threatened by two officers who were looking for him. In addition, Araceli sent word to his mother that she would rather see

the claimant dead than with another woman, and that she had police contacts in Panama. The claimant left Panama and travelled to Canada to seek protection.

[6] The determinative issue, in the opinion of the RPD, was state protection. The RPD found that the applicant made no reasonable or serious attempt to seek protection from the police or judicial authorities in Costa Rica prior to coming to Canada.

[7] The only issue in this application concerns state protection. As stated by the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, except in circumstances of complete breakdown of the state apparatus, there is a presumption that the state is capable of protecting the claimant. And clear and convincing confirmation of the state's inability to protect the claimant is required to displace this presumption.

[8] In that case, the Supreme Court did not address the standard of review applicable to this determination about state protection. More recent jurisprudence, most notably, *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, makes this a necessary exercise, however. As I explained in *Marchand Syndics Inc. c. Canada (Surintendant des faillites)*, [2004] A.C.F. nº 1926 at paras. 51-53 (QL), the provisions of section 18.1(4) of the *Federal Courts Act* are not self-applying and it appears that the pragmatic and functional approach must be applied to decide the appropriate standard of review.[1]

i) The Standard of Review

[9] The four contextual factors comprising the pragmatic and functional approach, which potentially overlap, are: "the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and the nature of the question - law, fact, or mixed law and fact" (*Dr. Q, supra* at para. 26).

[10] Turning to the first of those factors, decisions of the Board are not protected by a strong privative clause (see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982).[2] The second and third factors, however, militate in favour of curial deference. Whether state protection is available, or whether the claimant has sought that protection, engages the relative expertise of the RPD. And though the provision in question in effect requires a determination of the rights of individuals claiming refugee status, the legislation gives substantial discretion to the RPD.

[11] However, the nature of the question is key in this application and also brings into play relative expertise. Deciding whether a particular claimant has rebutted the presumption of state protection involves "applying a legal standard [i.e. "clear and convincing confirmation of a state's inability to protect": *Ward, supra,* at para. 50] to a set of facts", which according to the Supreme Court constitutes a question of mixed fact and law: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 26. The RPD has relative expertise with respect to the findings of fact and assessing country conditions. However, the Court has relative expertise with respect to whether the legal standard was met. Accordingly, the appropriate standard of review is in my view reasonableness *simpliciter*. This is consistent with the rulings characterizing the issue of state protection as a question of mixed fact and law: *Smith, supra* and *Racz, supra*.

[12] Briefly, before considering whether the RPD appropriately decided whether the applicant demonstrated the state's inability to protect, it is useful to describe what constitutes an unreasonable decision, as explained by the Supreme Court in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247:

55 A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).

ii) Rebutting the Presumption of State Protection

[13] It is useful to clarify what onus lies on the applicant to rebut the presumption of state protection by returning to first principles. In *Ward, supra,* LaForest J. noted that the claimant's subjective fear of persecution was not at issue; "the issue," he said was, "whether the fear is objectively justifiable", and that inquiry required an examination into the (non)existence of state protection. He then went on to describe when and how a state's inability to protect can be demonstrated at pages 724-25:

The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this protection. On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. [...] [Emphasis added]

[14] The Federal Court of Appeal nuanced this somewhat, holding that a mere refusal by the police or authorities to aid a claimant will not suffice to displace this presumption; the burden of proof on the individual increases in proportion to the democratic nature of a particular state's institutions (*Kadenko v. Canada (Minister of Citizenship and Immigration)* (1996), 143 D.L.R. (4th) 532 (F.C.A.)). And again, some debate has resulted in the jurisprudence surrounding the Court of Appeal's judgment (see *Racz, supra* for a discussion of different lines of authority).

[15] In my view, however, *Ward, supra* and *Kadenko, supra*, cannot be interpreted to suggest that an individual will be required to exhaust all avenues before the presumption of state protection can be rebutted (see *Sanchez v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 536 (T.D.)(QL) and *Peralta v. Canada (Minister of Citizenship and Immigration)* (1996), 123 F.T.R. 153 (F.C.T.D.)). Rather, where agents of the state are themselves the source of the persecution in question, and where the applicant's credibility is not undermined, the applicant can successfully rebut the presumption of state protection without exhausting every conceivable recourse in the country. The very fact that the agents of the state are the alleged perpetrators of persecution undercuts the apparent democratic nature of the state's institutions, and correspondingly, the burden of proof. As I explained in *Molnar v. Canada (Minister of Citizenship and Immigration)*, [2003] 2 F.C. 339 (T.D.), *Kadenko, supra* has little application when the "[...] police not only refused to protect the applicants, but were also the perpetrators of the acts of violence"; *Molnar, supra* at para. 19.[3]

[16] To require otherwise, escapes reason, as LaForest J., on behalf of the Supreme Court of Canada, clearly indicated in *Ward, supra* at page 724:

[...] it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.

[17] Turning to the case at bar, the RPD determined that the applicant did not adequately seek state protection by going to the police for help; by engaging his lawyer in relation to his difficulties in a more timely fashion; and by seeking the aid of the Ombudsman's Office.

[18] The problem is precisely the one envisaged in *Molnar, supra* and underlying LaForest J.'s comments in *Ward, supra*: the police (the OJI) were the perpetrators of the applicant's persecution. Thus notwithstanding that not every member of the OJI was implicated in the applicant's persecution, seeking help from the OJI - asking, in effect, the OJI to protect the applicant from itself - would have in all likelihood placed the applicant in greater peril.

[19] What is more, and with respect to the mechanisms cited by the RPD for the applicant to try and avail of the state's protection, there is evidence that the applicant's lawyer in Costa Rica did in fact contact the Ombudsman's Office but his attempt to get the Ombudsman to intervene was met with failure. Given that the applicant's credibility was not questioned, and in the face of evidence showing that the agents of the state were the perpetrators of the applicant's persecution and that

the applicant's lawyer in Costa Rica did attempt to enlist the aid of the Ombudsman's Office, I find the RPD's conclusion that the applicant made no serious attempt to seek protection unreasonable.

[20] For all these reasons, the application for judicial review is allowed. The matter is referred back for redetermination by a newly constituted panel.

ORDER

THIS COURT ORDERS that

[1] The application for judicial review is allowed.

[2] The matter is referred back for redetermination by a newly constituted panel.

"Danièle Tremblay-Lamer"

J.F.C.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-603-04

STYLE OF CAUSE: Alejandro Jose Martinez Chaves

and

The Minister of Citizenship and Immigration

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: February 3, 2005 by way of video conference

REASONS FOR ORDER

AND ORDER OF The Honourable Madam Justice Danièle Tremblay-Lamer

DATED: February 8, 2005

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[1] The few decisions that have considered the standard of review where state protection is the principal issue tend to diverge on the standard of review (see *Canada (Minister of Citizenship and Immigration) v. Smith*, [1999] 1 F.C. 310 (T.D.), where Lutfy J., as he then was, determined that the standard of review was reasonableness *simpliciter*; the same standard was applied in *Racz v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1562 (QL); contrast *Carmona v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1531 (QL) where the standard of review was found to be patent unreasonableness).

[2] Note that the wording of the privative clause has essentially remained the same following the amendments: compare *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 162(1) with *Immigration Act*, R.S.C., 1985, c. I-2, s. 67(1).

[3] Indeed, subsequent decisions distinguishing *Molnar, supra* add credence to this distinction: see *T.C. v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1337 (QL), and *Bandula v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1341 (QL). Note also that in *T.C., supra*, the applicant's testimony to the effect that the authorities inflicted the persecution was found non-credible.