Federal Court  Cour fédérale

Date: 20100510

Docket: IMM-4831-09

Citation: 2010 FC 503

Ottawa, Ontario, May 10, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

GIOVANNY JEHIEL COBIAN FLORES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application by Giovanny Jehiel Cobian Flores (the applicant) under sections 72 and following of the *Immigration and Refugee Protection Act*, S.C., 2001, c. 27 (the Act) for judicial review of a decision of a panel of the Refugee Protection Division of the Immigration and Refugee Board (the panel) dated August 31, 2009, number MA8-02422.

[2] The panel determined that the applicant is not a refugee or a person in need of protection on the ground that state protection was available to him in Mexico. The applicant is seeking review of that decision.

[3] The application for judicial review will be allowed, primarily on the ground that the analysis of the availability of state protection should ordinarily be preceded by an analysis of the refugee claimant's subjective fear of persecution, which includes an assessment of the applicant's credibility and of the plausibility of his or her account.

[4] The availability of state protection should not be decided in a factual vacuum with regard to a refugee claimant's personal circumstances. A decision concerning the subjective fear of persecution, which includes an analysis of the refugee claimant's credibility and of the plausibility of his or her account, must be carried out by the Immigration and Refugee Board in order to establish an appropriate context for an analysis, where necessary, of the availability of state protection that takes into account the individual situation of the refugee claimant in question.

Background

[5] The applicant is a young citizen of Mexico who was born in September 1987 and lived in the city of Guzman, in Jalisco state, and he claims he is a national bicycle racing champion in the "cyclo-cross" class. According to the narrative attached to his personal information form and his testimony before the panel, he is the biological son of Jose Ignacio Fernandez Pelayo, a dangerous drug trafficker who is also involved in human trafficking. He alleges that he only learned of his

biological parentage recently, when his aunt disclosed the truth about his birth to him and that truth was subsequently confirmed by his mother.

[6] His curiosity was aroused, and he alleges that he confronted his biological father in May 2007. On that occasion, he saw his biological father in the company of some federal highway police. He allegedly observed them collaborating in illegal trafficking of immigrants and transporting drugs by truck, in the course of which bribes were paid to the police. The applicant states that he was disgusted by these activities and reported his biological father to the police, but they refused to accept his testimony once they learned that the federal highway police were involved in the case. The applicant also alleges that his biological father contacted his mother by telephone after the applicant attempted to report him, to warn her to keep her son quiet.

[7] The day after attempting to make the report, a funeral wreath bearing the applicant's name was allegedly delivered to his home. He was afraid, and took refuge in Guadalajara for a month, where he did nothing. He ultimately decided to participate in a bicycle race in San Luis Potosi and so he discussed the threats made against him with an official of the national sports council of Mexico, who reassured him and told him that he himself would submit a report to the police in Guadalajara.

[8] The applicant alleges that he went himself to the police in Guadalajara to warn them that if anything happened to him, the person responsible would be his biological father. They purportedly

refused to take his statement on the ground that the applicant was not from Guadalajara and he should have gone to the police in his place of residence instead.

[9] The applicant alleges that he nonetheless took part in the races in San Luis Potosi on July 1, 2007, but after the competitions he was accosted by members of the judicial police, who struck him hard when he mentioned the name of his biological father. The police allegedly ordered him to keep quiet about his father and his illegal activities. The applicant states that he spent six days in hospital after the beating by the police.

[10] The applicant alleges that his mother tried to retain a lawyer to take his case, but they all refused, for fear of retaliation, and recommended that he flee Mexico. He therefore got on the flight to Montréal on July 26, 2007, to live with a friend who is a student there.

[11] When the applicant arrived in Montréal, the Canadian customs officer asked him several times whether he had problems in Mexico, but each time he said no. It was not until several months after the applicant arrived in Canada that he made a claim for refugee protection.

Decision of the panel

[12] The panel did not analyze the applicant's credibility or question the plausibility of his account; it was completely silent on those points. There is therefore no analysis or decision regarding the subjective fear of persecution in the panel's decision.

[13] The panel based its decision strictly on the question of the availability of state protection in Mexico, and on that point adopted the decision of another panel of the Immigration and Refugee Board, in file TA6-07453, dated November 26, 2007, which it said was persuasive.

[14] After briefly setting out the principles that apply to rebut the presumption of state protection, the panel noted that the applicant did not make an application to a human rights commission in Mexico or use a telephone line made available to the public for reporting corruption in the public service. The panel also referred to the documentation in the record indicating that certain departments of the Mexican government offer services to the public to combat corruption and drug trafficking.

[15] The panel also noted that the efforts of the Mexican government seem to be bearing fruit, since, according to the documentation available, some instances of corruption have been punished, in particular in the case of individuals associated with the drug cartel. The panel also noted that the number of arrests in Mexico in connection with drug-related criminal activities is rising.

[16] The panel therefore concluded that the applicant had not rebutted the presumption of state protection, notwithstanding his numerous reports to the police and his being beaten by the police, since he had not made efforts to use the various other avenues available to him in Mexico.

Position of the parties

[17] The applicant submits that in his case the police also acted as the agent of persecution. He adds that the panel should have taken into account not only the willingness of the state to offer protection but also its ability to do so in his particular case, which the panel did not do.

[18] The Minister submits that it was up to the applicant to rebut the presumption of state protection by clear and convincing evidence, and on a balance of probabilities. The evidence must establish, in particular, that the applicant tried to exhaust the remedies reasonably available to him in his country to obtain state protection.

[19] It is the Minister's submission that the applicant failed to rebut that presumption, although he approached the police on several occasions, because he did not seek the protection of a human rights commission or another federal police force. Notwithstanding the fact that the agents of persecution were police officers, it cannot be concluded that Mexico is unable to protect one of its nationals simply on the ground that some of its public officials are corrupt. In these circumstances, the panel's decision is reasonable.

Applicable standard of review

[20] In *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 282 D.L.R. (4th) 413, [2007] F.C.J. No. 584 (QL), at paragraph 38, the Federal Court of Appeal confirmed that questions as to the adequacy of state protection are "questions of mixed fact and law ordinarily reviewable against a standard of reasonableness"; see also *Chaves v. Canada (Minister of*

Citizenship and Immigration), 2005 FC 193, 45 Imm. L.R. (3d) 58, [2005] F.C.J. No. 232 (QL), at paragraphs 9 to 11; *Nunez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1661, [2005] F.C.J. No. 2067 (QL), at paragraph 10; *Franklyn v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1249, [2005] F.C.J. No. 1508 (QL), at paragraphs 15 to 17; *Capitaine v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 98 , [2008] F.C.J. No. 181 (QL), at paragraph 10; *Mendoza v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1191, [2010] F.C.J. No. 312 (QL), at paragraphs 25 to 27.

[21] The standard of review applicable to a decision of the Refugee Protection Division of the Immigration and Refugee Board dealing with the availability of state protection is therefore reasonableness.

Issue

[22] I am of the opinion that there is only one issue in this case: whether it was reasonable for the panel to analyze the availability of state protection without first making a finding as to the applicant's credibility and the plausibility of his account, and thus establishing a precise factual context in which the analysis could be done.

Analysis

[23] The decision of the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (*Ward*) is the starting point for any analysis concerning the availability of state protection.

[24] Whether the protection of a refugee claimant's country of origin is available is central to refugee law, as observed by Justice La Forest in *Ward*, at page 709:

> International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. For this reason, James Hathaway refers to the refugee scheme as "surrogate or substitute protection", activated only upon failure of national protection; see *The Law of Refugee Status* (1991), at p. 135.

[25] That approach extends to both refugees within the meaning of the United Nations Convention on the Status of Refugees, contemplated by section 96 of the Act, and persons in need of protection within the meaning of paragraph 97(1)(*b*) of the Act. Section 96 and subparagraph 97(1)(*b*)(i) of the Act provide as follows:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the	*b*) soit, si elle n'a pas de nationalité et se trouve hors du

country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
[…]	[…]
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

[26] To obtain Canada's protection, a refugee claimant must prove a subjective fear of persecution, and must prove that this fear is objectively justified. As the Federal Court of Appeal observed in *Rajudeen v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 129, [1984] F.C.J. No. 601 (QL), there is a subjective component and an objective component, and both are necessary to meet the definition of Convention refugee. I add that both components, subjective and objective, are also required to claim Canada's protection under paragraph 97(1)(*b*) of the Act.

[27] A state's inability to provide protection is relevant only to the analysis of the second component, concerning objective fear.

[28] As Justice Pelletier observed in *Zhuravlvev v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 3, [2000] F.C.J. No. 507 (QL), at paragraph 16:

> The Court held that the availability of state protection is to be considered in the context of deciding whether the claimant's fear of persecution is well-founded. A finding of a well-founded fear of persecution requires two prior findings. The claimant must have a subjective fear of persecution and that there must be an objective basis for that fear. La Forest J. speaking for the Court, found that the lack of state protection established the objective basis of the fear.

[29] The question that arises in practice in analyzing the objective basis of the fear is how refugee claimants can prove their country's inability to protect them, and the reasonableness of their efforts to exhaust all internal remedies for state protection. In *Ward*, Justice La Forest lists various methods available to refugee claimants, including the testimony of similarly situated individuals, or their own testimony of personal incidents in which state protection did not materialize.

[30] However, the analysis of the availability of state protection should be carried out only where the refugee claimant's subjective fear of persecution has first been established by the panel conducting the hearing. The rest of the analysis, including the analysis of the availability of state protection, can be properly carried out only once a subjective fear of persecution is established.

[31] In other words, save in exceptional cases, the analysis of the availability of state protection should not be carried out without first establishing the existence of a subjective fear of persecution. The panel responsible for questions of fact should therefore analyze the issue of the subjective fear of persecution, or, in other words, should make a finding as to the refugee claimant's credibility and the plausibility of his or her account, before addressing the objective fear component which includes an analysis of the availability of state protection.

[32] The analysis of the objective fear should ordinarily be carried out after the analysis of the subjective fear, since the particular context that is unique to each case is often conclusive for the objective analysis. A refugee claimant who has no subjective fear of persecution cannot ordinarily allege absence of state protection. As well, the analysis of the availability of state protection will vary considerably depending on the subjective fear in issue. A subjective fear of a low-level marijuana dealer might lead to a radically different conclusion in the analysis of objective fear as compared to a subjective fear of being pursued by a large and powerful drug cartel with virtually unlimited resources. In one case, state protection might be available, but it might not be in the other case, and it is therefore important for the panel to make reasoned findings concerning the subjective fear of persecution before proceeding with the analysis of the objective fear of persecution, which includes the availability of state protection.

[33] As well, a prior analysis of subjective fear allows the panel to avoid engaging in truncated analyses of the availability of state protection. In this case, the panel carried out no analysis and made no determination concerning the subjective fear of persecution, specifically the applicant's

credibility and the plausibility of his account. No context unique to the applicant was established to guide the analysis of the availability of state protection. This is an error that is reviewable by this court. The analysis of the availability of state protection should not become a method for avoiding making a determination concerning the subjective fear of persecution.

[34] I see no inconsistency between the approach advocated here and the decision of Justice Sexton in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 282 D.L.R. (4th) 413, [2007] F.C.J. No. 584 (QL). In *Hinzman*, it was decided that the absence of state protection must be established before undertaking the analysis of the other aspects of the objective fear of persecution. However, in so deciding, the Federal Court of Appeal did not reject the prior analysis of the subjective fear of persecution. On the contrary, it reiterated that the question of the availability of state protection is still an integral part of the analysis of the objective fear of persecution, while pointing out that there is no need to analyze the other elements related to objective fear if state protection is available. That being said, the prior analysis of the subjective fear of persecution is still central to the determination of refugee status, and that principle was not altered by *Hinzman*.

[35] As Justice Létourneau observed in *Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 F.C.R. 636, [2008] F.C.J. No. 399 (QL), at paragraphs 14 and 15, deciding questions of credibility before analyzing the availability of state protection will spare scarce judicial resources, and it should therefore be addressed first.

[36] In *L.A.O. v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1057, [2009] F.C.J. No. 1295 (QL), at paragraph 24, and in the recent decision in *Torres v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 234, at paragraphs 37 to 43, my colleague Justice Zinn observed that state protection cannot be determined in a vacuum, and the analysis of state protection instead calls for a contextual approach that takes into account the individual circumstances of each refugee claimant. In *Torres*, the application for judicial review was allowed because, among other reasons, the panel had carried out only a minimal analysis of the individual circumstances of the refugee claimant (on that point, see paragraph 43 of the decision).

[37] In the case before me, no analysis of the claimant's individual circumstances was carried out by the panel before it began the analysis of the availability of state protection.

[38] I also note the recent decision in *Mendoza v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 119, in which, at paragraph 33, Justice Lemieux provided an exhaustive summary of the principles stated in numerous decisions relating to the availability of state protection, in particular *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, 295 F.T.R. 35, [2006] F.C.J. No. 439 (QL) and *Hurtado-Martinez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 630, [2008] F.C.J. No. 804 (QL). These principles make it plain that each case is *sui generis* and, although state protection can be established in a decision of the Board or of this Court concerning Mexico or one of its states, an analysis of the individual case in issue must still be carried out before it can be concluded that the presumption of state protection has not been rebutted in that particular case.

[39] The Act also establishes an administrative framework that weighs heavily on the side of a prior analysis of the subjective fear of persecution. There are pragmatic reasons why the Refugee Protection Division of the Immigration and Refugee Board should make a finding regarding the credibility of refugee claimants and the plausibility of their accounts.

[40] The relevant provisions of the Act relating to pre-removal risk assessment (PRRA) are reproduced below:

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	**112.** (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
113. Consideration of an application for protection shall be as follows:	**113.** Il est disposé de la demande comme il suit :
(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection, or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	*a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;
(*b*) a hearing may be held if the Minister, on the basis of	*b*) une audience peut être tenue si le ministre l'estime requis

prescribed factors, is of the opinion that a hearing is required;	compte tenu des facteurs réglementaires;
(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;	*c*) s'agissant du demandeur non visé au paragraphe112(3), sur la base des articles 96 à 98;
[…]	[…]
114. (1) A decision to allow the application for protection has (*a*) in the case of an applicant not described in subsection 112(3), the effect of conferring refugee protection; and (*b*) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection.	**114.** (1) La décision accordant la demande de protection a pour effet de conférer l'asile au demandeur; toutefois, elle a pour effet, s'agissant de celui visé au paragraphe 112(3), de surseoir, pour le pays ou le lieu en cause, à la mesure de renvoi le visant.

[41] Section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) provides as follows regarding the application of paragraph 113(*b*) of the Act:

167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following:	**167.** Pour l'application de l'alinéa 113*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in	*a*) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une

sections 96 and 97 of the Act;	question importante en ce qui concerne la crédibilité du demandeur;
(*b*) whether the evidence is central to the decision with respect to the application for protection; and	*b*) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(*c*) whether the evidence, if accepted, would justify allowing the application for protection.	*c*) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[42] The effect of these provisions is to allow in many cases a PRRA officer to proceed with a new review of the case under sections 96 and 97 of the Act after the initial refugee claim has been rejected by the Refugee Protection Division. However, the new application under the PRRA process must be based on new evidence that arose or was discovered after the decision by the Refugee Protection Division.

[43] Where the credibility of the refugee claimant or the plausibility of his or her account was not analyzed by the Refugee Protection Division, the PRRA analysis may be more difficult. If the refugee claim is rejected by the Refugee Protection Division solely because the refugee claimant failed to rebut the presumption of the availability of state protection, and the claimant's individual circumstances were not analyzed (as in this case), and conditions in the country in question change between the date of the decision and the date of the PRRA analysis, the PRRA officer might very well have to grant status to a claimant whose credibility, and the plausibility of whose account, were never analyzed.

[44] We should note that it is rare for PRRA officers to hear applicants, and PRRA cases are generally decided on a written record. If a PRRA officer wishes to assess an applicant's credibility in a case in which the Refugee Protection Division failed to do so, he or she must then hold a new hearing, in the presence of the applicant, pursuant to section 167 of the Regulations. Thus, even if the PRRA officer carries out an analysis of the applicant's credibility and the plausibility of the applicant's account in a case in which the Refugee Protection Division failed to do so, this leads to the duplication of proceedings and of hearings.

[45] Accordingly, a pragmatic and functional approach to implementing the scheme provided in the Act and the Regulations strongly favours a prior analysis of the credibility of refugee claimants and of the plausibility of their accounts by the Refugee Protection Division.

[46] Under the existing legislative framework, refugee claimants are entitled to an oral hearing before the Refugee Protection Division, and so it is there that their credibility and the plausibility of their account must be determined. As Justice Wilson observed in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R 177, at pages 213-14:

> I should note, however, that even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person: see *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at pp. 806-08 (*per* Ritchie J.) I find it difficult to conceive of a situation in which compliance with fundamental justice

> could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

[47] In this case, the absence of an analysis of the applicant's subjective fear by the panel leads to the conclusion that a person severely beaten by the police and pursued by a major drug trafficker (also involved in human trafficking) who is acting in collusion with the police in several cities in Mexico would still enjoy state protection by reporting corruption via a telephone line set up for that purpose or by filing a complaint with a human rights commission.

[48] I do not believe that such a conclusion is reasonable where the panel made no finding concerning the applicant's subjective fear in order to establish an appropriate context for analyzing the availability of state protection. As I observed earlier, the analysis of the availability of state protection should not become a method of avoiding making findings concerning the subjective fear of persecution.

[49] The reasonableness of a decision is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 47. In the circumstances of this case, no reasoned analysis of the applicant's credibility and of the plausibility of his account was carried out by the panel. The panel's decision concerning the availability of state protection is therefore flawed, given that the factual framework in which that analysis must be carried out was not first established.

[50] Accordingly, the matter will be referred back for reconsideration and rehearing in order to carry out the necessary prior analysis of the applicant's subjective fear.

[51] The parties did not propose a question for the purposes of paragraph 74(*d*) of the Act, and accordingly no question will be stated.

JUDGMENT

THE COURT ORDERS that:

1. The application for judicial review be allowed;

2. The matter is referred back to the Immigration and Refugee Board to be heard by a different panel of the Refugee Protection Division, which shall proceed with an analysis of the applicant's subjective fear, which includes an assessment of the applicant's credibility and of the plausibility of his account, and this analysis is to be carried out prior to the analysis of the availability of state protection.

"Robert M. Mainville"
Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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