Federal Court  Cour fédérale

**Date: 20101022**

**Docket: IMM-1412-10**

**Citation: 2010 FC 1041**

**[UNREVISED CERTIFIED ENGLISH TRANSLATION]**

**Ottawa, Ontario, October 22, 2010**

**PRESENT: The Honourable Madam Justice Bédard**

**BETWEEN:**

**NELSON RUBEN RALDA GOMEZ**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated February 23, 2010, which rejected the applicant's claim for refugee protection and determined that he was not a refugee within the meaning of section 96 of the IRPA or a "person in need of protection" within the meaning of section 97 of the IRPA.

**Background**

[2] The applicant is a citizen of Guatemala. He fears being threatened by a criminal gang, the Mara Salvatrucha (Maras), if he returns to his country.

[3] The applicant was a fisherman. In December 2004, when he was fishing with a friend, he was allegedly approached by the Maras, who tried to extort them by demanding that they hand over their catches three days per week. They complied with this demand until December 2005.

[4] On December 20, 2005, the Maras demanded that they hand over their catches every day. The applicant's friend refused, and the Maras beat him and threatened to kill him. On December 25, 2005, the applicant and his friend went back to fish but decided to throw most of their catch back into the water rather than give it to the Maras. The Maras beat the applicant and his friend when they noticed the small catch they had brought. The applicant managed to flee. He went home during the night, and his parents told him that they had been visited by the Maras, who were looking for him. The applicant went into hiding at his uncle's home in Retalhuleu. On December 25, 2005, the applicant's mother advised him that his friend had disappeared and that the Maras were looking for him everywhere, even in Retalhuleu.

[5] The applicant left Guatemala on January 15, 2006, and went to the United States. He remained there until he came to Canada in January 2007 and claimed refugee protection.

**Impugned decision**

[6] The Board rejected the claim for refugee protection for two reasons. First, it found that the applicant had not rebutted the presumption of State protection. It is important to note that the Board stated that it did not consider it useful to assess the applicant's credibility because, even if he was credible, he had not rebutted the presumption. In that regard, the Board stated that it must be presumed that Guatemala was able to protect its citizens and that the applicant had made no effort to seek protection from the authorities in Guatemala. The Board was not satisfied with the applicant's explanations, which were to the effect that he was afraid of making a complaint because he had been warned by the Maras to keep quiet or he would die, that even if he had the Maras with whom he had had problems arrested, other gang members would seek revenge, and that the Guatemalan police had been infiltrated by this gang.

[7] Secondly, the Board found that the applicant did not prove that he had a subjective fear of persecution. The Board ruled that by illegally remaining in the United States for almost two years without claiming refugee protection, the applicant had not acted as a person who feared for his life would have. The Board was not satisfied with the applicant's explanations in that regard.

**Issues**

[8] This application for judicial review raises two issues:

1) Did the Board err in finding that the applicant had not rebutted the presumption that Guatemala was able to protect him?

2) Did the Board err in finding that the applicant had not demonstrated a subjective fear of persecution, and was this finding determinative?

[9] For the following reasons, I find that the Board made errors warranting intervention by this Court.

**Analysis**

***Standard of review***

[10] It is trite law that issues regarding the adequacy of State protection are questions of mixed law and fact, which are subject to the standard of reasonableness (*Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, [2007] F.C.J. No. 584; *Rocque v. Canada (Citizenship and Immigration)*, 2010 FC 802, [2010] F.C.J. No. 983). The first issue will therefore be analyzed according to the standard of reasonableness.

[11] It is also well established that the Board's findings of fact, especially its assessment of the evidence, are also subject to the standard of reasonableness. It is not up to the Court to substitute its own assessment of the evidence for that of the Board, and it will intervene only if the Board's conclusions are based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339; *Martinez v. Canada (Citizenship and Immigration)*, 2009 FC 798, [2009] F.C.J.

No. 933; *Alinagogo v. Canada (Citizenship and Immigration)*, 2010 FC 545, [2010] F.C.J. No. 649).

[12] The second issue also involves a sub-question of law: was the Board's conclusion regarding the applicant's subjective fear fatal to his application for refugee protection? This question will be reviewed on the basis of the standard of correctness (*Dunsmuir*).

[13] The role of the Court when it reviews a decision according to the standard or reasonableness was established in *Dunsmuir*, at paragraph 47:

> . . . A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

**Analysis**

***a. Did the Board err in finding that the applicant had not rebutted the presumption that Guatemala was able to protect him?***

[14] The applicant submits that the Board conducted a superficial and selective analysis of the evidence regarding the ability of Guatemala to protect its citizens and that it failed to consider the documentary evidence he submitted, which was clear and convincing evidence of the inability of Guatemala to protect its citizens.

[15] The respondent in turns submits that the Board is presumed to have considered all of the evidence and is not required to mention all of the evidence adduced, that the Board's finding was based on the evidence, and that a reading of the decision shows that the Board was aware of the problems with corruption in Guatemala. The respondent also submits that, in any event, the documentary evidence adduced by the applicant was not clear and convincing evidence of Guatemala's inability to protect its citizens and that in the absence of any attempt by the applicant to seek assistance from the Guatemalan authorities, the Board's finding was reasonable.

[16] In my view, at first sight, the Board stated the proper principles but conducted an insufficient and superficial analysis of the evidence submitted by the applicant.

[17] In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, the Supreme Court clearly established that, absent the complete breakdown of the state apparatus, there is a presumption that a country is able to protect its citizens and that a person must seek protection in his or her own country before claiming refugee protection in a foreign country.

[18] Justice La Forest explained as follows the principle underlying the protection of refugees and the crucial importance of the presumption according to which the home State offers protection to its citizens:

> At the outset, it is useful to explore the rationale underlying the international refugee protection regime, for this permeates the

> interpretation of the various terms requiring examination. 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. With this in mind, I shall now turn to the particular elements of the definition of "Convention refugee" that we are called upon to interpret.
>
> [Emphasis added]

[19] The presumption of the availability of State protection can only be rebutted if the applicant submits "clear and convincing evidence" of his or her home country's inability to offer effective protection (*Ward*). In *Carillo v. Canada (Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 F.C.R. 636, the Federal Court of Appeal dealt with the nature of the evidence which was required and specified the following at paragraph 30: "In other words, a claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate".

[20] In *Kadenko v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1376, 143 D.L.R. (4th) 532 (FCA), Justice Décary wrote that the burden of proof was on the claimant and was directly proportional to the level of democracy in the state in question.

[21] The Board properly stated the above principles in its decision. It then found that the applicant had not rebutted the presumption of State protection because he had not sought the help of the Guatemalan authorities before claiming refugee protection. The Board did not accept the applicant's explanations for his failure to do so.

[22] In general, an applicant must have sought assistance from the authorities before concluding that the State is unable to give him or her adequate protection, but this is not necessary in all cases, as the Supreme Court noted in *Ward*:

> A refugee may establish a well-founded fear of persecution when the official authorities are not persecuting him if they refuse or are unable to offer him adequate protection from his persecutors . . . however, he must show that he sought their protection when he is convinced, as he is in the case at bar, that the official authorities -- when accessible -- had no involvement -- direct or indirect, official or unofficial -- in the persecution against him. (*José Maria da Silva Moreira*, Immigration Appeal Board Decision T86-10370, April 8, 1987, at 4, *per* V. Fatsis.)
>
> This is not true in all cases. Most states would be willing to attempt to protect when an objective assessment established that they are not able to do this effectively. Moreover, 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.

[23] In *Ramirez Chagoya v. Canada (Citizenship and Immigration)*, 2008 FC 721, Justice Martineau wrote the following on the failure to seek help from the authorities:

> . . . This Court pointed out recently in *Shimokawa v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 445, [2006] F.C.J. No. 555 (QL), at paragraph 21: ". . . in seeking state protection, refugee claimants are not expected to be courageous or foolhardy. It is only incumbent upon them to seek protection if it is seen as being reasonably forthcoming. If the refugee claimants

> provide clear and convincing evidence that contacting the authorities would be useless or would make things worse, they are not required to take further steps." In short, it is unreasonable to force refugee claimants to ask for protection that has little chance of materializing or that will be a long time coming, simply to demonstrate that state protection is ineffective.

[24] It is however up to the applicant to show that it was unreasonable to require that he seek the protection of Guatemala to justify his omission. In this case, the applicant explained that he had not contacted the authorities for three reasons: the Maras had warned him to keep quiet, failing which he would be dead; he feared other Maras would take revenge, even if those who had confronted him were arrested; and the Maras had infiltrated the police. The applicant also submitted documentary evidence in support of his allegations.

[25] The Board acknowledged that there was a tremendous amount of corruption in Guatemala but found that the country was making efforts to solve its problems and protect its citizens. The Board based its finding on two documents. It cited an excerpt from the 2008 *US Country Report* which showed that free elections had been held in Guatemala in November 2007 and that the party in power had been elected for a four-year term. The Board also cited the response to a request for information dated May 5, 2009, which described the complaint mechanism available to crime victims.

[26] The applicant submits that the documents cited by the Board did not in any way show that Guatemala was able to protect its citizens, while the Board ignored the documentary evidence which he had submitted at the hearing. He referred to three documents included in the National

Documentation Package on Guatemala: Tab 2.3, which deals with the impunity of criminals and the low conviction rate; Tab 7.2, which deals with the inability of police forces to control the gangs and corruption within the police forces; and Tab 7.5, which deals with the corruption of police forces, violence, extortion by gangs and the epidemic of violence.

[27] It is right to affirm as did the applicant, that the Board is presumed to have considered all of the evidence and there is no need to state all of the documentary evidence that was before it (*Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.); *Ramirez Chagoya v. Canada (Minister of Citizenship and Immigration),* 2008 FC 721). However, when the applicant submits evidence on an important point which directly contradicts the Board's findings, it has the obligation to deal with this evidence and to explain why it chose to dismiss it. In *Cedepa- Gutierrez v. Canada (Minister of Citizenship and Immigration),* [1998] F.C.J. No. 1425, 157 F.T.R. 35, Justice Evans aptly explained the applicable parameters in this regard:

> **15** The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency. Just as a court will only defer to an agency's interpretation of its constituent statute if it provides reasons for its conclusion, so a court will be reluctant to defer to an agency's factual determinations in the absence of express findings, and an analysis of the evidence that shows how the agency reached its result.
>
> **16** On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (*Medina v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their

> finding, and to explain how they dealt with it (see, for example, *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.
>
> **17** However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact. [Emphasis added]

[28] I find that in this case, the documents on which the Board based its decision do not give any indication of the effectiveness of the protection mechanisms and were not sufficient to conclude that the applicant had not rebutted the presumption of State protection, considering the evidence to the contrary. In its decision, the Board did not mention, much less deal with, the evidence submitted by the applicant which tended to support his argument about the inability of the authorities to protect him from the Maras. The Board did not have to accept this evidence, but it was relevant and tended to contradict the finding that the State was able to protect its citizens from the violence of the Maras. A general statement by the Board about corruption in

Guatemala was not, in this case, sufficient. The Board should have mentioned this evidence and explained why it could not give it any weight (see to the same effect: *Khakim v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 909; *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1336, [2008] F.C.J. No. 1673; *Aguirre v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 916, [2010] F.C.J. No. 1116).

[29] I therefore find that the Board's decision regarding the existence of State protection was unreasonable.

***2) Did the Board err in finding that the applicant had not demonstrated a subjective fear of persecution, and was this finding determinative?***

[30] The applicant submits that the failure to claim refugee protection in the United States should not be determinative because the Board did not question his credibility.

[31] The respondent submits that the applicant's failure to claim refugee protection in the United States undermines his credibility and shows the lack of a subjective fear, which is fatal to his claim for refugee protection.

[32] It is important to reframe the Board's decision. First, the Board did not conduct distinct analyses of the claim for refugee protection under sections 96 and 97 of the IRPA respectively. However, upon reading the decision, I presume that it dealt with applicant's lack of subjective

fear in the context of a "fear of persecution", which is a feature of an analysis under section 96 of the IRPA. The Board wrote the following:

> [14] Furthermore, the claimant has not behaved like a person who fears for his life. The claimant went to the United States and lived there for almost two years illegally without claiming asylum there. The panel confronted him with this failure to claim asylum in the United States. He explained that he did not want to claim asylum in the United States because he was afraid of being returned to his country, as has happened to other refugees.
>
> [15] The panel is of the opinion that these explanations are insufficient to justify a two-day stay in the United States without claiming asylum when the claimant alleged that he was afraid of being returned to his country. The panel would like to note here the meaning of the words of the Honourable Justice MacKay in *Ilie*: [translation] "A claimant's failure to claim refugee status in a country that is a signatory to the Convention or to the 1967 Protocol contradicts the claim that he/she fears persecution."
>
> [16] On this point, the case law has already established the principle according to which a person who claims to fear for his or her life must take the first opportunity in a country that is a signatory to the Convention and/or the *Protocol relating to the Status of Refugees* to claim that country's protection. The claimant did not take this opportunity, which casts doubt on his subjective fear. Regarding this absence of subjective fear, the words of the Federal Court in *Kamana* should be noted: "The lack of evidence going to the subjective element of the claim is a fatal flaw which in and of itself warrants dismissal of the claim, since both elements of the refugee definition—subjective and objective—must be met."

[33] Analyzed from the perspective of section 96 of the IRPA, the Board's finding was determinative. This is not however the case under section 97 of the IRPA, which requires the application of an objective test. In *Cruz Herrera v. Canada (Citizenship and Immigration)*, 2007 FC 979, [2007] F.C.J. No. 1297, Justice Beaudry wrote that "[w]hile the applicant's lack of subjective fear properly disposes of his claim under section 96, the subjective element is not

required in order to conclude that a claimant is a person in need of protection under subsection 97(1)". (See also *Sanchez v. Canada (Minister of Citizenship and Immigration*, 2007 FCA 99, [2007] F.C.J. No. 336; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1070, [2009] F.C.J. No. 1312; *Balakumar v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 20, [2008] F.C.J. No. 30).

[34] However, I find that subjective fear may sometimes be relevant when assessing the truth of the allegations of a person who claims to be a person in need of protection within the meaning of subsection 97(1) of the IRPA.

[35] In any event, I find that in this case, it was unreasonable for the Board to conclude that the applicant did not behave as a person who fears for his or her life would have. As the Supreme Court stated in *Ward*, "[t]he subjective component relates to the existence of the fear of persecution in the mind of the refugee". The Board inferred from the fact that the applicant had not claimed refugee protection in the United States that he had not behaved as a person who fears for his or her life would have. In so concluding, the Board was in fact questioning the credibility of the applicant, who claimed to fear for his life. However, the Board specifically stated at the beginning of its decision that it had not assessed the applicant's credibility. It could not therefore draw any negative inferences about the applicant's credibility without making any analysis. I am therefore of the opinion that the Board's finding was unreasonable.

[36] The parties did not propose any question of importance for certification, and no question will be certified.

## JUDGMENT

**THIS COURT ORDERS** that the application for judicial review be allowed and that the applicant's claim for refugee protection be referred back to the Immigration and Refugee Board for redetermination by a differently constituted panel.

"Marie-Josée Bédard"
Judge

Certified true translation
Michael Palles

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1412-10 |
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| **DATED:** | October 22, 2010 |

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