Date: 20080707

Docket: IMM-607-06

Citation: 2008 FC 834

Montréal, Quebec, July 7, 2008

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

OMAR JESUS DIAZ ESPINOZA
ALEJANDRA PAMELA DIAZ FORTES
RAMIRO ARCE VERA
SUSANA CECILIA ARCE
MATEO RODRIGO ARCE DIAZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The principal applicant, Mr. Omar Jesus Diaz Espinoza, his two daughters, Alejandra Pamela Diaz Fortes (younger daughter) and Susana Cecilia Arce (older daughter), as well as the latter's spouse, Ramiro Arce Vera (son-in-law) and their young son, Mateo Rodrigo Arce Diaz (child), seek to quash a decision of the Immigration and Refugee Board, Refugee Protection Division (Board), dated January 12, 2006, which found them to be neither "convention refugees"

nor “persons in need of protection” pursuant to sections 96 and 97 respectively, of the *Immigration and Refugee Protection Act* (*Act*), S.C. 2001, c. 27.

I. Facts

[2] The applicant and his two daughters left Peru in 1998 to settle in the United States of America (USA). While living there illegally they failed to make a claim for Refugee Protection.

[3] The older daughter met and married in USA, a fellow country man, the son-in-law. The son of this couple, the applicant child, was born in the USA, while his parents, maternal aunt and grandfather are all native Peruvian citizens. There is no evidence on the record of any allegations of fear of persecution in the USA for this child applicant.

[4] In April 2000, the principal applicant left his two daughters in the USA, and returned to Peru to process his application for a USA work visa. However, instead of a work visa he was only granted a visitor’s visa before returning to the USA, in July 2000.

[5] During the three-month period of his return in Peru, the principal applicant stayed with friends and family members and did not experience any threats or attacks from factions of the Shining Path. At the expiration of their USA visitor’s visas, in March 2002, the principal applicant and his daughters decided to remain illegally in the USA.

[6] With respect to the son-in-law, who had made a refugee claim in USA, he was found in October 16 1998, by USA authorities, not to be a Convention refugee due to the availability of state protection in his home country. He remained in the USA illegally, had a child with the older daughter applicant in July 2004, and they subsequently married in November 2004.

[7] The applicant and his younger daughter left the USA and came to Canada on December 13, 2004, while his son-in-law and his older daughter and their child followed 5 days later. They all sought refugee protection immediately upon their arrival in Canada.

[8] They now claim that their lives would have been in danger had they returned to Peru. The basis of their fear is the actions of the "*Sendero Luminoso*" (the Shinning Path) and the Fuerzas Armadas Revolucionarias de Colombia (FARC) who oppose the religious work of the principal claimant and fear of the Shining Path who oppose the journalistic and religious work of the son-in-law.

[9] Their refugee hearing was held on October 13, 2005 and the Board's decision rejecting their claims was rendered on January 12, 2006. After the hearing but before the decision was rendered, counsel for the applicants submitted additional documents.

II. Impugned Decision

[10] After a review of the entire families' files, including the post-hearing documents submitted by the applicants, the Board found that the adult applicants did not have a credible basis to make refugee claims due to the fact they failed to make a claims in the USA, while the son-in-law's claim had been denied because of late filing and the availability of state protection in Peru. With respect to the son-in-law, the only applicant who had made a refugee claim in the USA, and whose claim was dismissed by the USA authorities, the Board noted that the documentary evidence failed to support his contention that he was targeted, and in addition the Board found that there was adequate state protection in Peru.

[11] Finally, after a careful analysis of the multiple threads of the five applications, the pattern of living illegally for a number of years in the USA, and the confirmed desires of the adult applicants not to return to Peru and their profile, the Board concluded as follows:

> There is little doubt in my mind that having being outside Peru for over ten years, the adult claimants are highly motivated to remain in Canada. That their desire to stay in Canada is, however more suited to the immigration process than to refugee determination. Refugee law deals primarily with needs; immigration law deals primarily with desires. To use the refugee determination process as an alternative procedure for immigration is an abuse of the system and runs afoul of the jurisprudence. [Emphasis added by the Court].
>
> [. . .]
>
> I find that they have no fear of a risk to their lives, a risk of cruel and unusual treatment or punishment. There is also not more than a mere possibility that their return to Peru would expose them to a fear resulting from the danger of torture. Accordingly, I find that the

> claimants' desire to live in Canada must be addressed under immigration law and not refugee law.

[12] This negative decision forms the basis of the present application for judicial review.

III. Issues

[13] As a preliminary matter, counsel for the applicants had made extensive written submissions alleging that the Board had violated the principles of natural justice by adopting the reverse order questioning as per Guideline 7 of the Immigration and Refugee Board. However, this line of argument was abandoned, in light of the resolution of this matter by the Federal Court of Appeal in *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 734 (QL); leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 394 (December 13, 2007) (QL).

[14] Thus the only remaining issue for this Court is to verify if the Board erred in fact or in law in concluding as it did.

IV. Standard of Review

[15] The Board's findings with respect to state protection are findings of fact reviewable on the standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL); *Khokhar v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 449, [2008] F.C.J. No. 571 (QL); *Eler v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 418

(QL), 2008 FC 334, at paragraph 6). This is a deferential standard which recognizes that certain questions before administrative tribunals do not lend themselves to one specific, particular result but instead give rise to a number of possible and reasonable conclusions.

[16] Therefore the Court will review the Board's decision with regard to "the existence of justification, transparency and intelligibility within the decision-making process [and also] [...] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at paragraph 47).

[17] Further, the Court will keep in mind that the Board is not required to establish the existence of state protection. The onus to rebut the presumption of state protection remains at all time on the refugee claimant, (*Canada (Attorney General) v. Ward,* [1993] 2. S.C.R. 689, [1993] S.C.J. No 74 (QL)).

V. Analysis

[18] The applicants submit that the Board overly simplified the alleged fears of the adult applicants and erred in failing to consider the son-in-law’s political involvement.

[19] However, it is clear from the transcript and the decision read as a whole that the Board did consider the evidence provided by the son-in-law to corroborate his membership in a Peruvian political party. The reasons given by the Board are not to be read hypercritically and the Board is

not required to refer to every piece of evidence that it received and that is contrary to its finding, and it is not required also to explain how it dealt with it in every detail. The Board must be presumed to have considered all the evidence, and it appears here that it did. But unfortunately the applicants failed to convince the Board of their pretensions and to rebut the presumption of state protection, considering their personal situation.

[20] The Board was entitled to take into account the delay before the applicants claimed refugee status (*Huerta v. M.E.I.* (1993), 157 N.R. 225 (F.C.A.) at 227; *Hue v. M.E.I.*, March 8, 1988, A-196-87 (F.C.A.); *Heer v. M.E.I.*, April 13, 1988, A-474-87 (F.C.A.)), and it did not err when it found that a return of the applicant to his country of alleged persecution, for a period of three months, is hardly compatible with the behaviour of someone who allegedly fears persecution (*Liviu-Mitroi v. M.E.I.*, [1995] F.C.J. No. 216 (QL), February 8, 1995, A-202-92, (F.C.A.)).

[21] International refugee law comes into play only in situations when the protection expected from the state in one's country of nationality is unavailable, and then only in certain situations. Absent a situation of complete breakdown of state apparatus, it is generally presumed that a state is able to protect a claimant. This presumption "serves to reinforce the underlying rationale of international protection as a surrogate, coming into play where no alternative remains to the claimant" (*Ward*, above, at 709 and 726).

[22] A claimant must provide clear and convincing confirmation of his state's inability to protect (*Ward,* above at 724), having in mind that the protection provided by the authorities of the country

of origin need not to be perfect (*Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 18 Imm. L.R. (2d) 130 (F.C.A.)).

[23] The Board conducted a thorough examination of the documentary evidence before finding that the applicants are neither "convention refugees" nor "persons in need of protection" pursuant to sections 96 and 97 respectively, of the *Act*, and that in addition there is in Peru adequate protection available for them against the Shining Path and the FARC's project.

[24] Having reviewed the impugned decision in the context of the entire file, including the post-hearing evidence, the Court concludes that the assessment of the Board falls entirely within a range of possible, acceptable outcomes which are more than defensible in respect of the facts and the law. The Board enjoys a certain expertise *vis-à-vis* this reviewing Court, to readily identify and ascertain the reliability of the sources, and is owed deference for its findings.

[25] The applicants call more or less upon this Court to reassess the evidence and the articles submitted, to weigh their probative value and to substitute its findings for those of the Board's. This Court refuses this invitation since it is the role of the Board and its role exclusively, to weigh evidence. This is precisely what the Board did in this case, even if the applicants would have preferred a different result.

[26] While the applicants make several criticisms at the decision, the Court is satisfied that the Board's decision contains no error of fact or law that would individually or cumulatively warrant the intervention of this Court.

[27] The application will therefore be dismissed. Further, the Court agrees with the parties that there is no question of general interest to certify.

JUDGMENT

FOR THE FOREGOING REASONS THE COURT dismisses the application.

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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