

Date: 20081222

Docket: IMM-2551-08

Citation: 2008 FC 1404

Ottawa, Ontario, December 22, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

GERBERTH DANILO AGUILAR REVOLORIO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is a judicial review of a decision of the Immigration and Refugee Board (IRB) denying a claim for refugee protection. The IRB decision turned principally on credibility findings. In the specific circumstances of this case, the Court is prepared to question the credibility findings for the reasons set forth herein.

II. BACKGROUND

[2] The Applicant, a 45-year old male, is a citizen of Guatemala. He was a senior official in a Guatemalan prison and was either dismissed or resigned the day before a prolonged riot broke out, during which several people were killed - among them former Sergeant Jose Obdulio Villanueva. It appears that the Applicant was involved in attempting to reduce tensions and negative conditions in the prison prior to the riot. The IRB at one point had a concern as to whether the Applicant was in control of the prison at the time of the riot.

[3] In his application to the IRB, the Applicant contended that a reliable source had informed him he was to be assassinated by a member of a kidnapper gang. According to the Applicant, the alleged assassination had been ordered by Byron Lima Oliva, one of three former military who were imprisoned for the killing of a bishop known for his human rights and historical recovery work. The assassination was apparently ordered because the former Captain believed that the Applicant had arranged for his co-accused, former Sergeant Jose Obdulio Villanueva, to be killed during the riot.

[4] The Applicant contended that he had been followed, threatened with death, and given 72 hours to leave the country. He said that, before leaving the country, he filed a denunciation with the Guatemalan penal court claiming that individuals had followed him and that they appeared to be associated with the Guatemalan government. Evidence of the denunciation was submitted.

[5] In late May of 2003, the Applicant went to the United States where he remained for just over four months. When he returned to Guatemala, the Applicant went to his father's farm outside Guatemala City and largely stayed out of sight for a year and a half.

[6] After that time, the Applicant began re-integrating into his normal Guatemalan life. He was then in contact with a judge of the penal court from whom he learned that nothing had been accomplished with respect to his denunciation. The Applicant argued that the lack of positive results in respect of his denunciation was evidence that state protection was not available to him, as the police had full power to investigate and had chosen not to do so.

[7] The Applicant said that he became aware, in July 2005, that he was being followed by the same men who had pursued him two years before. He also stated he was receiving phone threats.

[8] On August 2, 2005, the Applicant left Guatemala for the second time and stayed in the New Jersey area for approximately seven and a half months. After that, he travelled to Canada to make his refugee claim.

[9] The IRB concluded that there was a criminal vendetta against him, but that there was no connection between the vendetta and any of the Convention grounds.

[10] The IRB found the issue of credibility to be the determining factor in the case, and found that the Applicant's conduct was inconsistent with that of a person holding the subjective fear of

harm under section 96. The IRB summarized the Applicant's reasons for returning to Guatemala after four months in the United States as being his dislike of living in California. The IRB also found that the Applicant's failure to claim refugee status at the earliest opportunity was fatal to his claim of imminent risk. In its decision, the IRB twice referred to Bogota, rather than to Guatemala City, when describing the Applicant's return to his normal life after some time at his father's farm.

III. ANALYSIS

[11] The Applicant raises two issues in support of this judicial review. The first is that the decision was based on peripheral grounds. The Court understands that there is an argument that the IRB did not focus on the seriousness of the threats to him which arose from his work in the prison. The second is that the IRB made numerous factual errors in its credibility assessment.

[12] The IRB's decision turned on its conclusion of credibility, which it held to be the central issue in this case. In the post *Dunsmuir* environment (*Dunsmuir v New Brunswick*, 2008 SCC 9), such decisions attract a standard of review of reasonableness, with deference owed to the IRB's expertise and its opportunity to assess the witness (see also *Khokhar v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 449).

[13] As to the first issue, the Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Sellan*, 200 FCA 381 has held that a general finding of lack of credibility is sufficient to dispose of a claim unless there is "independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim" (*Sellan*, above, at paragraph 3).

[14] Here there was such evidence, as confirmed by the IRB in its conclusion, under s. 96 that there was a vendetta against the Applicant although it was not tied to s. 96 grounds. The vendetta was capable of being tied to s. 97 grounds, yet the IRB paid scant attention to this objective evidence.

[15] The Court finds that there are sufficient and significant errors, as well as errors of lesser magnitude, which undermine the sustainability of the decision. The Court is reluctant to overturn credibility findings except in the clearest case of error, such as occurred here.

[16] The IRB decided this case on the basis of lack of subjective fear. It is evident that the IRB found the Applicant's conduct - reavilment and delay in claiming - inconsistent with a real fear of harm.

[17] The IRB erred in its credibility assessment in that it misstated or misunderstood the Applicant's reasons for reavilment. The IRB is entitled to deference in respect of credibility findings only if it understands the evidence before it.

[18] Contrary to the IRB's finding that the Applicant returned to Guatemala because he did not like living in California, the Applicant clearly stated that he returned because he thought that the situation in Guatemala had improved. He also stated that he went to his father's farm, rather than to his home in Guatemala City, both at his family's request and for financial reasons. The credibility

finding and the reason for reavailment are so tightly linked that an error on this one point is sufficient to undermine the very basis for the IRB's decision.

[19] The IRB also seemed to make light of the threats to the Applicant on the basis that he never was actually harmed. It is not necessary for an applicant to establish the veracity of threats by actually suffering the threatened harm (*Muckette v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1388).

[20] Lastly, the IRB erred in its reference to Bogota. It is clear that the proper city of reference was Guatemala City. This misstatement might be a typographical error. There is no indication other than two references to Bogota to suggest that the country of reference was Columbia. However, against the background of the other errors in this case, the Court cannot be assured that this was no more than a typographical error or minor inadvertence.

IV CONCLUSION

[21] For all these reasons, this judicial review is granted, the IRB's decision quashed, and the matter is to be referred back to a different panel for a new determination.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is granted, the Immigration and Refugee Board's decision is quashed, and the matter is to be referred back to a different panel for a new determination.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2551-08

STYLE OF CAUSE: GERBERTH DANILO AGUILAR REVOLORIO

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

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**REASONS FOR JUDGMENT
AND JUDGMENT:** Phelan J.

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