Federal Court  Cour fédérale

Date: 20090506

Docket: IMM-3673-08

Citation: 2009 FC 464

Ottawa, Ontario, May 6, 2009

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

ALMIR VALDIVIA RODRIGUEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), the applicant is seeking judicial review of a decision dated July 30, 2008, by the Refugee Protection Division of the Immigration and Refugee Board (Board) finding that the applicant was neither a *Convention refugee* nor a *person in need of protection* within the meaning of sections 96 and 97 of the Act and rejecting his claim for refugee protection.

I. Facts

[2] The applicant, a citizen of Peru, claims that he cannot return to his country because he allegedly refused to participate for his employer in acts of corruption involving government officials, and that consequently his life is now in danger.

[3] His problems allegedly began in May 2003, when his employer asked him to sign documents containing false information. The applicant refused and had to flee to the United States to escape persecution. He stayed in the United States for 31 months before coming to Canada and claiming refugee protection.

II. Impugned decision

[4] The main reason the Board gave for its decision was "[TRANSLATION] that the onus was on the applicant to rebut the presumption that the Peruvian authorities were able to protect him." In addition, "[TRANSLATION] while the situation may not be perfect in Peru, . . . (it) cannot conclude that there is clear and convincing evidence that the Peruvian government would not attempt to protect the applicant were he to return to his country," especially since, "in his case, not only has the applicant not exhausted all forms of recourse available to him to obtain help and protection, but he has made no such request."

[5] Alternatively, the Board stated that it was "[TRANSLATION] uncertain about the credibility of the applicant" because it felt "[TRANSLATION] that the applicant adapted his answers to the questions asked," and was not satisfied with his answers when he was confronted with certain contradictions.

[6] Is the Board's decision unreasonable?

III. Analysis

Standard of review

[7] The Board's decision is based on the presumed ability of the Peruvian government to provide the applicant with the necessary protection, and the applicant has failed to rebut that presumption by providing sufficiently clear and convincing evidence to satisfy the Board otherwise.

[8] This proceeding raises questions of mixed fact and law that make it subject to the standard of reasonableness defined in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir).* The Board has expertise in the area within its jurisdiction; accordingly, the Court must treat the Board's decision with deference and avoid intervening unless there is just cause.

[9] The standard does not open the door to the type of intervention sought by the applicant, namely, to start over and assess the evidence so as to adopt the theory developed by the applicant in support of his application for judicial review. On the contrary, it is sufficient for the Court to

determine whether the impugned decision appears reasonable, because it is justified with regard to the facts in evidence and the law, or unreasonable, because it is unjustified.

State protection in Peru

[10] The applicant wishes to convince the Board, and now this Court, that his safety is threatened in Peru and that the Peruvian government is unable to protect him. The applicant maintains that he was the subject of attempts at bribery, repeated harassment, threats and attempted assault in Peru, yet he admits that he did not report his aggressors and their offences because he did not have faith in the police in his country.

[11] For the Board to grant his claim for refugee protection, the applicant had to present clear and convincing evidence to show that the Peruvian government was unable to provide him with the necessary protection, something that must be established to be recognized as a Convention refugee or person in need of protection within the meaning of sections 96 and 97 of the Act (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689). However, the Board found in its decision that the applicant failed to discharge his burden and did not make all reasonable efforts to try to obtain the protection of the Peruvian authorities.

[12] It was not sufficient for the applicant to show that state protection in Peru was not perfect. No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all of its citizens at all times. This Court has acknowledged, in several decisions, that although the situation is not perfect in Peru, Peru remains a democratic country that

provides its citizens with protection (*Valera v. Canada (Citizenship and Immigration)*, 2008 FC 1384, and *Lopez v. Canada (Citizenship and Immigration)*, 2007 FC 198, to list only the most recent).

[13] As the Board remarked in its reasons, when an applicant lives in a democratic state such as Peru, there is an increased obligation to seek the protection of that state. Accordingly, the applicant must show that he or she exhausted all reasonable courses of action available in his or her country to obtain the necessary domestic protection, before contemplating seeking protection from another country (*Kadenko v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1376).

[14] It appears from the applicant's testimony that he failed to file a valid report that would make it possible for the police to identify his assailants. He was not actually refused help; he merely failed to provide the police with the information required for the police to intervene, because he did not have faith in the police. In short, he did not even put the assistance available to him to the test.

[15] However, he did commence legal proceedings against his employer to end the harassment, obscenities and discrimination directed at him. If the applicant had enough faith in his country's legal system to bring a civil action against his employer, it would seem contradictory, if not unjustifiable, for him not to have sought help from the police or from the authorities in his country to obtain protection from his persecutors, given that he alleges that his life was in danger. The fact that the applicant initiated a civil action did not make it possible for him to rebut the presumption of state protection.

[16] Moreover, the applicant did not even await the outcome of the proceedings commenced against his employer before leaving his country. Instead of waiting and attempting to avail himself of the protection potentially provided by his country, the applicant left for the United States, where he stayed for 31 months without claiming refugee protection, before coming to Canada to claim protection here. However, as stated by the Supreme Court of Canada in *Ward*, above, refugee protection is not available where there has been an inadequate attempt to seek out the protections available in one's home country (*Hinzman v. Canada (Citizenship and Immigration),* 2007 FCA 171, at paragraph 52).

Lack of subjective fear

[17] The Board also noted that "[TRANSLATION] not only did the applicant fail to seek protection in his country, but he also failed to seek protection after he arrived in the United States. The explanation that he believed that his country's situation would improve is not enough to justify staying 31 months in the United States without claiming refugee status when the applicant maintains that he is afraid to return to his country."

[18] The Board correctly went on to refer in its decision to this Court's past decisions finding that failure to make a refugee claim in a country that is a signatory to the 1967 Protocol belies the suggestion that the person fears persecution.

IV. Conclusion

[19] In short, and to paraphrase *Hinzman*, above, at paragraph 62, "the applicant has failed to satisfy the fundamental requirement in refugee law that claimants seek protection from their home state before going abroad to obtain protection through the refugee system." The applicant's failure to file an effective complaint with the police and await the outcome of civil action commenced in Peru, his haste in leaving his country for the United States and his 31-month stay in that country without seeking protection make one wonder about his claims, and it does not surprise the Court that the Board, for additional reasons cited, was "uncertain" about the applicant's credibility.

[20] However, the Court does not consider it necessary to deal with the Board's criticisms regarding the applicant's credibility, to which the applicant is objecting. It is sufficient to find that the applicant did not make a serious effort to seek protection in his country before leaving it, so that it is impossible for the Court to assess whether the protection that might have been available was reasonably sufficient or not.

[21] Therefore, the applicant's claim for refugee protection in Canada cannot be allowed, and his application for judicial review of the Board's decision to the same effect will be dismissed. Since no serious question of general importance was proposed or warrants being proposed, there is no question to be certified.

JUDGMENT

FOR THESE REASONS, THE COURT DISMISSES the application for judicial review**.**

"Maurice E. Lagacé"
Deputy Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3673-08
STYLE OF CAUSE:	ALMIR VALDIVIA RODRIGUEZ v. M.C.I.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 26, 2009
REASONS FOR JUDGMENT:	LAGACÉ D.J.
DATED:	May 6, 2009

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