Federal Court Cour fédérale

Date: 20090611

Docket: IMM-5190-08

Citation: 2009 FC 600

Ottawa, Ontario, June11, 2009

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MIGUEL ANGEL OROZCO TOVAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated November 10, 2008, which found that the applicant was neither a Convention refugee nor a person in need of protection.

[2] The applicant requested that the decision be set aside and the matter be referred back to a newly constituted panel of the Board for redetermination.

Background

[3] Miguel Angel Orozco Tovar, (the applicant) is a citizen of Colombia from Bogota. He is married with three children who remain in Bogota. The applicant worked on his family's ranch in Planadas, Tolima which is an area that is controlled by the Revolutionary Armed Forces of Colombia (FARC) as well as other right wing paramilitary units or paramilitaries. As is typical in areas controlled by the FARC, the applicant's father paid a war tax or vacuna to the FARC for many years.

[4] In 2004, the applicant received a note addressed to his brother's store stating that the applicant was sympathizing with the paramilitaries and spying on the FARC. The FARC claimed to have seen the applicant paragliding with a friend, a major in the national police, a few days earlier. The family then made efforts to persuade the FARC that they were not working against them. Although unsuccessful, the father tried to persuade his own FARC contacts to help. The applicant filed a denunciation to the National Attorney General's Officer and went to the Ombudsman's Office. In the end, the applicant was advised to be careful, but beyond that, assistance was not available.

[5] In 2006, the Columbian army appeared to be back in control of the farm area and the applicant returned. While he was there the FARC came to the farm. Although the applicant got away, the FARC allegedly took 22 cows in retaliation.

[6] The applicant left Colombia in September 2006 and spent time living in Chile, Argentina, and Peru but ultimately returned to Bogota for two months where he obtained a false Canadian passport before coming to Canada on December 2, 2006.

Board's Decision

[7] In rendering its decision, the Board found that the applicant was not a Convention refugee "as he does not have a well-founded fear of persecution for a Convention ground in Colombia". Further, the Board did not find that the applicant was in need of protection in that his removal to Colombia would not subject him personally to a risk to life or a risk of cruel and unusual treatment or punishment or a danger of torture.

[8] The Board stated that the determinative issue was the applicant's credibility.

[9] The Board did not find it plausible that the applicant would be as brazen as to paraglide over known FARC territory with a major in the National Police. As a consequence, the Board rejected this aspect of the applicant's testimony as false.

[10] In any case, the Board stated that even if the paragliding incident was true, it is odd that despite his alleged fear he remained in nearby Ibague from March to July 2004, before moving to Bogota with his family. The Board found it implausible that the applicant was able to hide in the house for that time given the FARC's tactics. The Board believed that the FARC would have known of the applicant's house and gone there and searched it, if they were in fact looking for him. Accordingly, the Board finds it improbable that the FARC did not track down the applicant and his family in Bogota either. The Board suggests that if the applicant was truly a target then they would have had contact with either the applicant in the two and a half years following the alleged condemnation or the wife and their children in the time that he was away in Chile, Argentina and Peru.

[11] The applicant's return from his travels did not illicit any more interest at that time which was curious to the Board. The Board stated that if "he truly had been declared a military target" they would have been watching his wife and children and become aware of his return to his family in Bogota.

[12] The Board noted that the FARC often takes severe quick action against their targets which was inconsistent with the story relayed by the applicant and which was rejected on a balance of probabilities.

[13] The Board also found it unusual that the father was able to remain on the farm without threats from the FARC and even sought to get their assistance in removing the condemnation on his

son's name. The Board is surprised that the FARC's reaction was not to brand the father a traitor, kidnap, or attack the family, in retaliation for the son's alleged spying on them in keeping with the information from the National Documentation Package about the violence committed by the FARC.

[14] The Board also rejected the oral testimony of a connection between the applicant's uncle's murder by unknown assailants because the event was "four years from the time that [the applicant] was alleged to have been declared a military target" making it unlikely that the two incidents were related.

[15] Finally, the Board finds that the applicant's conviction of possession of opium in 1995 further undermines "a picture of general untrustworthiness".

<u>Issues</u>

[16] The applicant submitted the following issues for consideration:

1. Did the Board base its decision on an erroneous finding of fact that it made in a perverse or capricious manner, or without regard to the material before it? Specifically:

a. Was the Board's finding that the applicant's father "lives without retribution from the FARC", as of the date of the hearing made in a perverse or capricious manner, or without regard to the material before it?

b. Was the Board's implied finding that the applicant and his family experienced no hardship or risk of "retribution from the FARC" made in a perverse or capricious manner, or without regard to the material before it?

c. Were the Board's findings with respect to probably actions of the FARC in the circumstances as related by the applicant made in a perverse or capricious manner, or without regard to the material before it?

d. Was the Board's finding concerning the applicant's general credibility as inferred from the fact of a prior criminal conviction made in a perverse or capricious manner, or without regard to the material before it?

2. Did the Board fail to observe a principle of natural justice, procedural fairness or other procedure it was required by law to observe? Specifically:

a. Did the Board's failure to mention or consider in its reasons the facts and issues surrounding the applicant's application to the Canadian Consulate in Bogota prior to his departure from his country constitute a failure to observe a principle of natural justice, procedural fairness or other procedure it was required by law to observe?

b. Did the Board's failure to mention or consider in its reasons the facts and issues surrounding the matter of the applicant's exclusion from refugee protection by reason of criminality constitute a failure to observe a principle of natural justice, procedural fairness or other procedure it was required by law to observe?

[17] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in finding that the subjective fear of the applicant and the objective threat by the FARC was implausible?

3. Did the Board err in finding that the applicant's prior criminal conviction compromised his general credibility?

4. Did the Board err when it failed to mention or consider the circumstances surrounding the applicant's application to the Canadian Consulate in Bogota prior to his departure from Colombia?

Applicant's Submissions

[18] The applicant first addresses the issue of the factual findings of the Board regarding the FARC. The applicant states that it is not the case that the applicant's father is not being threatened by the FARC. The father continues to pay vacuna or war tax. It is by way of this on-going threatening "relationship" that the father had contact with the FARC to the extent that he tried to get the condemnation of his son removed.

[19] The applicant states that the Board "attributes greater powers to the FARC than the guerrilla in Colombia possess in reality". Notwithstanding, the applicant submits that this has given him a false sense of security and caused him to change his assessment of the risk he was facing in his country. The applicant testified about the many precautions he took while living in Bogota and the on-going struggle of his father to manage the persecutory acts of the FARC.

[20] Ultimately, the applicant provided testimony for over four hours and the Board noted at the end of the testimony that his answers to his questions were detailed and consistent.

[21] The Board spent some time in the decision commenting on how the applicant's criminal conviction hurt his trustworthiness yet failed to mention that at the conclusion of the hearing the Board found that the applicant was not excluded from protection due to criminality but this was never referred to.

[22] In the decision, the Board did not mention the "one outstanding issue" that delayed the final decision by the Board and warranted a post hearing investigation, that being: the evidence that the applicant had sought protection from Canadian authorities in Colombia before his final departure to Canada. This evidence proves that the applicant did have a subjective fear of being harmed by the FARC and as such sought protection at the Canadian Consulate in Bogota.

[23] The applicant also submits that he did not fully realize the seriousness of the situation he was in with the FARC until he came to Canada. He testified that people become desensitized by the violence and threats in Colombia and that it was only after removing himself from his situation that he keenly recognized the danger of the situation.

Respondent's Submissions

[24] The standard of review according to the respondent is reasonableness which was recently reaffirmed by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12. Mr. Justice Rothstein, concurring with the majority in *Khosa* above, also went on to say that the level of deference indicated by paragraph 18.1(4)(d) of the *Federal Courts Act* is such that "… courts are only to interfere in the most egregious cases of erroneous fact finding".

[25] The respondent stated that this Court accords no deference to the determination of the content of the duty of procedural fairness according to the Federal Court of Appeal in *A.G. v. Sketchley*, 2005 FCA 404.

[26] The respondent then turns to the factual findings of the Board. The Board's finding that the applicant's father lived without fear because of the "alleged transgressions" of the applicant was reasonable. Testimony given by the applicant outlines that while the applicant's father was having problems with the FARC, the problems were often resolved with paying the fines that they imposed. Therefore, the Board concluded that the contact the father was having with the FARC did not constitute retribution but an on-going paying of vacuna to placate the FARC. As part of that testimony, the applicant said that "[the FARC] don't hurt me indirectly" but also said that his brother was in hiding because he was involved in the alleged incident.

[27] The respondent also disagreed that the Board's findings on the applicant's subjective fear were unreasonable. The Board noted that despite the evidence that the FARC could find anyone they wanted to, the applicant and his family remained at the same address in Bogota for two years without being contacted even once by the FARC. The applicant explained this as an attempt to "keep them isolated" but the Board saw this explanation as unreasonable given the allegations of fear.

[28] The respondent submits that the Board did not ignore the further explanation by the applicant that he did not fully grasp how serious the danger he was in, until he was living outside Colombia. This testimony, the respondent submits, still raises the question as to why no one in his family has been contacted by FARC and why "his family, now having a new found awareness of the danger in Colombia, have not taken any further steps to protect themselves from the FARC?"

[29] The respondent submits that the Board did not wrongly speculate on the FARC in assessing an objective threat. The applicant states in his testimony that the FARC is capable of finding the applicant and his family if they so desired and the Board decided that by extension: if there was a genuine threat, the family would have been located in Colombia.

[30] The findings on criminality are immaterial according to the respondent because they did not affect the prior findings of the Board that the applicant's fear was not objectively established.

[31] The Board did not act unfairly when they failed to wait for an answer from the Canadian Consulate in Bogota regarding an asylum claim of the applicant. This evidence was immaterial because even if this is the case, the problem remains of why the applicant remained in Bogota for two years and why after he left, his family was never targeted. The respondent submits that this evidence may speak to a subjective fear by the applicant but does not prove that there is more than a mere possibility of persecution given the other issues raised by the Board.

[32] The applicant's issue with the raising of the exclusion issue is also immaterial. The Board declared that exclusion was being "dropped" as an issue at the conclusion of the hearing and there was no benefit for the applicant in having mentioned it in the decision. The manner in which the Board raised the criminal conviction was related to credibility and not exclusion as it is known in the immigration context. The consideration made by the Board on the evidence was within their decision making authority.

Analysis and Decision

[33] **Issue 1**

What is the appropriate standard of review?

In *Dunsmuir v. New Brunswick*, 2008 SCC 9 the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question."

[34] This Court has applied a reasonableness standard of review to determinations of credibility. (see *Malveda v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 447; *Khokhar v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 449; *Aguirre v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 571; *Arizaj v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 774).

[35] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "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). Questions of law such as a duty of fairness are reviewable on a standard of correctness as are questions of procedural fairness (see *Chretien v. Canada (Commission of Enquiry into the Sponsorship Program and Advertising Activities, Gomery Commission)*, [2008] F.C.J. No. 973).

[36] **Issue 2**

Did the Board err in finding that the subjective fear of the applicant and the objective threat by the FARC was implausible?

I will first address the findings on subjective fear. The Board found that the applicant's claim of subjective fear was not credible for two reasons. One, it was implausible that the paragliding incidence would have happened in the first place given that the applicant knew of the FARC presence in the area. Two, that if it is to be assumed that the incident took place, the

applicant did not provide an adequate and reasonable explanation as to why he or his family were not found and targeted in the two years following the alleged condemnation.

[37] The applicant in his submissions is essentially requesting a reweighing of the evidence which I am not permitted to do. My authority on the conclusions drawn by the Board is to find a reviewable issue only if it falls outside a range of acceptable outcomes (see *Dunsmuir* above). In this case, I find that it does not. I acknowledge that there are problems inherent in the Board making assumptions about the FARC and how they may or may not act without referring to evidence. They relied on the applicant's evidence on the FARC given in his testimony but concluded differently than the applicant. The applicant when asking why the FARC singled him out stated, "Because they found me accompanied by the police major gliding over their area". Given all the evidence, the finding of the Board is one of the reasonable findings that could have been made.

[38] In relation to the objective threat of the FARC, again this Court is being asked to reweigh evidence which it is not authorized to do (see *Kwizera v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1261 (CanLII)). The applicant's submissions that the Board wrongly speculated on the FARC are understandable. However, as I found above, the conclusions were not outside a range of acceptable outcomes given the evidence. Speculations can also be called inferences, which the Board is required to make in assessing the evidence. Accordingly, I am of the view that judicial review cannot be granted on this ground.

[39] **Issue 3**

Did the Board err in finding that the applicant's prior criminal conviction compromised his general credibility?

I find that the Board's treatment of the applicant's prior criminal conviction was within the authority of the Board. Although the Board did not recite the narrative surrounding the conviction, he is not obliged to refer to every piece of evidence (see *Tong v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8354 (F.C.)). And, if the criminal conviction had played a greater role in the credibility findings, then perhaps greater scrutiny would be warranted. I would therefore not allow judicial review on this ground.

[40] **Issue 4**

Did the Board err when it failed to mention or consider the circumstances surrounding the applicant's application to the Canadian Consulate in Bogota prior to his departure from Colombia?

In 2004, after receiving a note from the FARC, the applicant submitted it to the Canadian Embassy in Bogota for the purpose of a refugee claim. At the end of the applicant's hearing, the Board gave the RPO two months to obtain proof of the filing of the note with the Canadian Embassy. In its decision, the Board member made no mention of whether anything was obtained from the Canadian Embassy. Credibility was the deciding issue in this case and whether the applicant went to the Embassy could be important in the assessment of his credibility. It is up to the Board to decide this point. The Board at the hearing, stated that there still was one outstanding issue, namely proof of the applicant going to the Canadian Embassy with the note.

[41] In my opinion, the Board’s failure to mention whether it received any evidence from the Canadian Embassy or whether it considered it in its determination of credibility is a reviewable error. The decision of the Board must be set aside and the matter remitted to a different panel of the Board for redetermination.

[42] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[43] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

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 country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du 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 :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au

Article 1 of the Convention Against Torture; or	sens de l'article premier de la Convention contre la torture;
(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,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Michael Brodzky	FOR THE APPLICANT
Tessa Kroeker	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michael Brodzky Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT