Federal Court Cour fédérale

Date: 20110217

Docket: IMM-1892-10

Citation: 2011 FC 194

Ottawa, Ontario, February 17, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

ISIDRO BATISTA MARTINEZ PANEQUE
AND SANDRA NIEVES ESTOPIAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of a member of the Immigration and Refugee Board (the "Board") pursuant to section 72(1) of the Immigration and Refugee Protection Act, SC 2001 c 27 ("IRPA") by Isidro Batista Martinez Paneque and Sandra Nieves Estopian (the "Applicants").

[2] In a decision dated March 22, 2010, the Board determined that the Applicants were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97, paragraph 1 of the IRPA. The Applicants claimed fear of persecution by the government of Cuba because of an incident which occurred in December of 2007, and because they have overstayed their Cuban exit visas.

[3] The Applicants are seeking a judicial review of this decision.

I. The Impugned decision

[4] The Applicants are citizens of Cuba. The male claimant has been a musician in Cuba since 1972. In April 2007, the Applicants came to Canada for several months to visit their daughter. During the visit, the male claimant tried to arrange a concert tour for his Cuban band in Canada. Unfortunately, his band was unable to get permission to leave Cuba for the tour. Upon returning to Cuba, the male applicant was unable to find work for his band.

[5] In December 2007, the male claimant approached the manager of the Music Center, a government agency responsible for finding work and paying musicians. Angry because the manager of the center had failed to find work for his band and could not provide a satisfactory explanation for refusing his proposed tour to Canada, the male claimant accused the manager and all government officials of being liars and not doing their jobs. He also questioned the kind of socialism being practiced in Cuba. The manager threatened to report him to the authorities for his comments and assured him that he would not work as a musician and would go to jail.

[6] The male claimant returned home and recounted the incident to his wife, and they decided to leave the country. Six weeks later, on February 12, 2008, the claimants left Cuba on the multiple entry visas to Canada that they already possessed. They requested refugee protection a few weeks later. The male claimant fears that, if he returns to Cuba, he will be jailed for his comments against the government official. The claimants also fear that they will be jailed or persecuted because they have remained outside of Cuba beyond the legally permitted time.

[7] The hearing was held on February 23, 2010, and the Board's decision was issued on March 22, 2010.

[8] The first part of the Board’s section 96 analysis focused on the lack of an objective basis for the claimant's fear of persecution flowing from the comments he had made to the government officials.

[9] Whilst the Board found that there are laws in place, as well as some evidence that suggests that the male applicant could be persecuted for having criticized the government, it did not believe that this would occur in this case since the male applicant remained in his home in Cuba for about six (6) weeks after the argument without any signs of persecution. Furthermore, the Board found that he successfully obtained permission from the Music Centre to leave Cuba. If the manager of the Music Centre truly intended to report the claimant, he would have done so during those six (6) weeks, or at the very least would have withheld permission for him to leave the country.

[10] The Board also discussed how Cuba often denies exit permits to those whose relatives have emigrated illegally (which the claimant's daughter did years ago). The Board noted that the Applicants had suffered no ill effects as a result of their daughter's departure and have, in fact, been permitted to leave the country twice since their daughter’s illegal emigration.

[11] Their other daughter remained in Cuba at their residence and has not encountered any difficulties further to her parents’ departure. She was not contacted regarding her father's criticism of the government, but did receive a call from the immigration authorities, requesting that she remove her parents from the Consumer registry, failing which they would not be able to return to Cuba.

[12] The Board also noted that the female claimant faces no problems other than those faced by her husband.

[13] Therefore, the Board found on the balance of probabilities that there was not a serious possibility that the claimants would face persecution.

[14] The second part of the Board’s section 96 analysis discussed the possibility of the claimants being punished for having remained outside of Cuba longer than the permitted time, as they testified would occur when they returned to Cuba.

[15] The Board found no persuasive evidence that the claimants in particular would be punished for having stayed in Canada longer than acceptable, other than the Cuban law of general application which, in fact, does punish those who remain too long outside of the country.

[16] The Board reviewed documentary evidence suggesting that emigrants who stay too long away from Cuba will lose their residency rights if they fail to obtain permission to return to Cuba before doing so. Unless an émigré has obtained a permit to reside outside Cuba, he cannot return there without a special re-entry permit.

[17] At the same time, however, the Board noted that article 215 of Cuba's criminal code provides that those who enter Cuba without completing the re-entry formalities risk one (1) to three (3) years of imprisonment.

[18] The Board pointed out the contradiction between these rules. In short, the Board accepted that there were consequences for returning without permission and that the claimants would likely lose their residency rights if they did so.

[19] Nevertheless, the Board concluded that there must be some method for obtaining the special permission to return to Cuba, even if the process is not transparent. The Board found that if they were to return home without permission and be punished, they would be punished only subject to a law of general application which the Board characterized as criminal rather than persecutory in nature. Hence the Board found that the claimants did not have a well-founded fear of persecution and were not Convention refugees and their section 96 claims failed.

[20] The Board then proceeded to evaluate the claimants' section 97 claims, stating that the determinative issue in the analysis would be whether the risk to the claimants was a law of general application. The Board noted that section 97(1)(iii) of the IRPA provides that a person at risk is not a person in need of protection if that risk is inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards.

[21] The claimants' argument that their potential imprisonment if they were to return to Cuba without permission would violate international standards was rejected by the Board, since it found that the evidence did not support such a conclusion.

[22] The claimants' argument that the law preventing their return to Cuba violates international standards was rejected by the Board since it found that the objective evidence did not establish that they could not return to Cuba, even though they may have to complete an administrative process in order to do so.

[23] Finally, it was argued that prison conditions in Cuba are so harsh that imprisonment amounts to cruel and unusual treatment or punishment. The Board acknowledges that prison conditions in Cuba are indeed, harsh and unpleasant. However, it found there was no persuasive evidence that those conditions violated international standards.

[24] The Board noted that the claimants are at risk of being punished for violating Cuba's laws of general application and found there was no evidence or of risk of torture. Therefore, the Board found that their section 97 claims failed.

II. Relevant legislation

[25] The relevant portions of the Act are as follows:

Convention refugee	**Définition de « réfugié »**
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, (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 (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.	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) 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) 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.
Person in need of protection	**Personne à protéger**
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 Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au 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	b) soit à une menace à sa vie ou au risque de traitements ou

treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

(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.

Personne à protéger

(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.

III. Issues

[26] The Applicants identified five issues; they can be properly treated under two separate questions:

a. Did the Board err in assessing the evidence before it and concluding that there was no objective basis to the Applicant's subjective fear?

b. Did the Board err in finding that imprisonment for violating Cuba's exit laws does not amount to persecution under s. 96 of the IRPA or cruel and unusual punishment under section 97 of the IRPA?

A. *Standard of Review*

[27] The first issue is reviewable on a reasonableness standard because the question of objective fear is one of mixed fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47), whereas the second issue is reviewable in part on a standard of reasonableness and in part on correctness as the question relates to the application of the correct legal test in assessing the proportionality of exit laws. As *Dunsmuir* held at paragraph 50, "is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law." The application of the correct legal test to the facts "is an issue of mixed fact and law that is to be reviewed on a standard of reasonableness" (*Miroslav v Canada (Minister of Citizenship and Immigration)*, 2010 FC 383, at para 20.

IV. Analysis

A. *First Issue: Evidence Submitted and Objective Fear*

[28] The Applicants submit that the Board found their fear of political persecution to be objectively unfounded because it made an error in determining that the manager of the Music Center, whom they allegedly feared, had granted them permission to leave Cuba. The Applicants allege that this finding by the Board constitutes a reviewable error because the Board misapprehended the facts, or else disregarded or ignored their evidence. The Applicants submit that they never stated in their testimony that they had sought permission from the manager of the Music Center to leave Cuba. The Applicants indicate that the confusion may have arisen from the fact that a member of the band obtained the exit visa for the Applicants by applying to the Cultura House, which the Board must have confused with the Music Centre.

[29] This factual error, they contend, was central and key to the Panel's finding that their fear lacked an objective basis, since the Board believed that the person who could possibly trigger their persecution had been instrumental in obtaining their exit visas.

[30] They further submit that such a failure to properly analyse the factual evidence before it renders the Board's decision unreasonable.

[31] In reply, the Respondent reminds the Court that the Applicants suffered no ill effects during the six weeks that they remained in Cuba after the incident with the manager of the Music Center, arguing that it indicates that the Applicants had nothing to fear from him. The Respondent also highlighted the fact that the Applicants were permitted to leave the country after the incident.

[32] With respect to the misunderstanding as to who exactly had granted the Applicants permission to leave the country, the Respondent explained their understanding of the Personal Information Form ("PIF") and the testimony. The Respondent submitted that the person who obtained permission for the Applicants to leave Cuba further to the incident with the manager of the Music Center was in fact employed by the manager of the Music Center. Therefore they submit that the Music Center was involved in the granting of permission to leave the country. Consequently, according to the Respondent, the Board's decision and its conclusion that the Applicants were not in danger of persecution was reasonable.

[33] The question is important because if, as determined by the Board, it was indeed the Music Center that granted the Applicants permission to leave Cuba after the incident, then it was surely reasonable for the Board to find it unlikely that its manager would trigger the persecution of the Applicants.

[34] To ascertain the nature of the testimony given, the Respondent referred the Court to volume 1, page 32 of the Application Record. In reviewing the PIF, no mention is actually made of the authority that granted permission to the Applicants to leave Cuba. In that respect the PIF only mentions that the Applicants took advantage of their multiple-entry visas to re-enter Canada on February 12, 2008.

[35] In the transcript the Applicant explains that he worked with three other musicians in the band, which was overseen by the Music Center. The Music Center is a government entity

responsible for finding work for, and paying, the band. The applicant mentions that there was another cultural agency called the Cultura House that works with the Music Center and to which other musicians belonged. While the Applicant was the administrator of the band, another member was the musical director. The Applicant goes on to state that the senior administrator at the Music Center with whom he had the dispute is named Cesar Casania.

[36] The record shows in volume 2, page 505 that after having received their daughter's invitation to come to Canada the Applicants needed authorization from a government entity called the Cultura House to obtain their exit visa. The transcript reveals that it was the musical director of the Applicant's band who presented the letter of invitation to the Cultura House and obtained permission for the Applicants to leave Cuba.

[37] Since the Music Center is responsible for hiring and paying all musicians that work in Cuba, the Respondent claims that the manager of the Music Center did play a role in obtaining the exit visa in that it was the musical director of the Applicant's band who obtained permission from the Cultura House. Since he was paid by the Music Center, he was an employee of the Music Center and therefore there was a form of involvement by the Music Center since it oversaw the band.

[38] There is no evidence on file to indicate that the music director of the Applicant's band obtained the exit visa for the Applicant with the knowledge of the Music Center. Therefore there is an error in the Board's characterization of the facts, and its assessment of the objective fear is undermined since it was certainly a key element in the Board's reasoning with respect to the absence of an objective fear.

[39] The Applicants submit that this error on the part of the Board renders its decision unreasonable as to the absence of an objective fear. This finding of fact still has to be balanced with the Board's other findings regarding an objective element of the Applicants' fear.

[40] It is established law that the Court will not intervene unless it is satisfied that a Board made a palpably erroneous finding of material fact, and that the finding was made without regard to the evidence. (*Cepeda-Gutierrez v Canada (Minister of Citizenship & Immigration)*, (1998) FCJ No 1425 (Trial Division).

[41] After review, I come to the conclusion that the Board's error is determinative in the circumstances since it underlies the basic tenet of the Board's finding as to the absence of an objective basis to the applicants' fear of persecution. While the Board took into consideration other elements such as the situation with respect to the daughter living in Canada and the daughter that remained behind in Cuba, the key element that triggered the Applicants' decision to flee Cuba remains the dispute with the manager of the Music Center and the fear of reprisals. The decision was therefore unreasonable because it is based on a misinterpretation of key facts considered by the Board in coming to its conclusion. An error of fact that undermines the Board's decision can constitute grounds for sending the case back for redetermination, as in *Warnakulasuriya v Canada (Minister of Citizenship and Immigration)*, 2008 FC 885, at para 10, and *Poologanathan v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 987, at para 14.

[42] This Court therefore finds that this error is fatal to the Board's decision. In view of this conclusion, this Court finds no need to decide on the merits of the other arguments presented by the Applicants.

[43] The application for judicial review is allowed.

[44] Counsel for the Applicants reserved his opinion as to whether there was a question of general application to certify. Respondent's counsel did not see any question nor does this Court. Therefore no such question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The Board's decision dated March 10, 2010 is set aside. The claim is returned for reconsideration.

THIS COURT'S FURTHER JUDGMENT is that no question of general interest is certified.

"André F.J. Scott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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