Federal Court  Cour fédérale

Date: 20111128

Docket: IMM-211-11

Citation: 2011 FC 1360

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 28, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

VALENTIN FERNANDO BARBOSA PONCE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (hereinafter the panel or IRB). The decision refused to grant the applicant refugee status.

[2] The application for judicial review is dismissed for the reasons that follow.

BACKGROUND

[3] The applicant, Mr. Valentin Fernando Barbosa Ponce, is Mexican. He completed two years of university studies at the National Polytechnic Institute (IPN) and obtained a job in a computer lab in 2000.

[4] In 2004 the applicant was elected secretary general of section D-III-87, third level, of the National Education Workers Union (union). Highly placed members of the union allegedly tried to corrupt him to get him to comply with national directives and to support the New Alliance Party, founded by the union's president, during the 2006 presidential election. He was also asked to stop attending peaceful demonstrations in favour of workers' rights.

[5] Starting in March 2006, the applicant was harassed and threatened by means of telephone calls and anonymous letters from people involved with the union and the IPN. He was also beaten on one occasion in 2006 and a second time in 2007, in addition to being taken to the outskirts of town and left to make his own way back. The first incident was reported to the police, who did nothing.

[6] The applicant pursued his union activities until August 2008, that is to say, until the end of his mandate as secretary general. At the end of his mandate and fearing for the safety of his two children, who were born in 2007, he moved to Canada in August 2008.

DECISION UNDER JUDICIAL REVIEW

[7] The panel refused the applicant's application for refugee status. The applicant's identity is not in issue. The panel determined that he was not credible. The IRB based its decision on contradictions in the applicant's testimony and on a rejection of evidence.

[8] The panel was of the view that the applicant had failed to prove that he had in fact been secretary general of section D-III-87 of the National Education Workers Union. The documentary evidence filed does not support the conclusion that he held this position, because nowhere in the documents is it indicated that the applicant was secretary general. Exhibit D-3 indicates that the applicant's title was secretary general, but this document is not genuine, given that it is a photocopy. The panel rejected this piece of evidence, which was filed late. Another document listed someone else as secretary general.

[9] The panel also found it implausible that the applicant continued to be a victim of persecution after the election on July 2, 2006.

[10] The panel also did not believe that the applicant had been assaulted twice and found his testimony to be "confused".

[11] In spite of the fact that the panel did not believe that the applicant had been persecuted, it also asserted that the grounds relied on by the applicant were not sufficient for him to be granted

refugee status. The IRB cited the fact that the applicant had an internal flight alternative (IFA) he could have availed himself of. The panel found that the applicant could have moved to another city in Mexico such as Acapulco, Guadalajara, Monterrey or Cancún. This option was raised at the hearing.

ISSUES

[12] The issues are:

1. Did the panel err by making findings of fact in an arbitrary manner and by improperly assessing the documentary evidence adduced by the applicant?
2. Did the panel correctly apply the test for determining whether there was an internal flight alternative?

STANDARD OF REVIEW

[13] The standard of review to be applied is reasonableness, as established by *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. The first issue is one of assessment of evidence, which is reviewable on a reasonableness standard (*Berhane v Canada (Minister of Citizenship and Immigration)*, 2011 FC 510 at paras 23 & 24; and *Kaur v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1120 at para 9), and the second issue is whether there was an internal flight alternative, which calls for the same standard of review (*Soto v Canada (Minister of Citizenship and Immigration)*, 2011 FC 360 at para 19; and *Guerilus v Canada (Minister of Citizenship and Immigration)*, 2010 FC 394 at para 10).

ANALYSIS

[14] The issues raised in this application for judicial review revolve mainly around the assessment of the evidence that was used as a basis for determining the applicant's credibility and the IFA. The issue of the applicant's credibility is central to this case because part of the IFA analysis was based on the applicant's lack of credibility. I find there were a few minor errors which undermine the panel's decision. However, these errors do not affect the panel's final decision. Moreover, the panel did not err in applying the test to determine the existence of an IFA. Consequently, the application for judicial review is dismissed.

> *Did the panel err by making findings of fact in an arbitrary manner and by improperly assessing the documentary evidence adduced by the applicant?*

[15] The applicant raises two arguments with regard to this issue: inconsistencies in the panel's findings of fact and its rejection of Exhibit R-1.

[16] As for Exhibit R-1, the respondent claims that the Court cannot consider new evidence, citing *Farhadi v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 315. I do not agree with the respondent on this point because the transcript of the hearing before the panel indicates that the applicant filed this piece of evidence with the panel on the morning of the hearing and the panel's decision indicates that it considered the probative value of Exhibit R-1.

[17] The exhibit is a document from section D-III-87 of the union signed by the applicant in which he is designated as secretary general. The document is a photocopy and it is in Spanish. The panel gave no weight to this exhibit because it is not genuine. I do not see anything unreasonable in that finding. Subrule 31(1) of the *Refugee Protection Division Rules*, SOR/2002-228 (hereinafter the Rules) states that the applicant must provide originals of all copies provided to the panel. Rule 28 of the Rules indicates that all documents submitted to the panel must be in either English or French (see also *Arenas Pareja v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1333; and *Hernandez Cortes v Canada (Minister of Citizenship and Immigration)*, 2009 FC 583 at paras 13 & 24). It was therefore open to the panel to assign little probative value to this piece of evidence, which was a copy and which was in a foreign language. The Court indicated that the panel has broad discretion with respect to excluding evidence (see *Ribeiro Da Costa Soares v Canada (Minister of Citizenship and Immigration)*, 2007 FC 190 at para 22).

[18] The applicant claims that the panel made several errors of fact in its decision. On reading the decision, transcript and statement of the applicant, it is evident that the panel did make a number of errors in its assessment of the evidence. It must therefore be determined whether the decision falls within the range of reasonable decisions that were open to the panel (*Dunsmuir* at para 47).

[19] I believe these errors did not have an impact on the reasonableness of the panel's decision. The errors are minor and do not relate to the panel's criticism of the applicant's

credibility and the lack of documentary evidence, the two determinative elements of the panel's decision.

[20] The panel seems to have been mistaken as to the date of the start of his tenure as secretary general, his field of employment, and the reasons provided by the applicant as to why it was impossible for him to reproduce the originals of certain documents. The panel was mistaken in its assertion that the applicant had ceased his interest in workers' rights in 2007 instead of August 2008, just before he left for Canada.

[21] I fail to see how these errors in assessing facts of no substantial consequence could have affected the reasonableness of the panel's decision. My findings are the same with regard to the fact that the panel failed to mention, as the applicant indicated, that the applicant was a member of the HIJOS organization.

[22] Furthermore, as the respondent points out, document D-2, on which the applicant relied, does not list him as secretary general. In fact, the document refers to another person, G. Guillermo Pablo Quezada Ruiz, as secretary general. The panel also noted that a good part of the applicant's testimony was confused. Consequently, I find that the panel did not err in its assessment of the evidence or of the applicant's credibility.

Did the panel correctly apply the test for determining whether there was an internal flight alternative?

[23] This issue need not be addressed, as the respondent's lack of credibility was sufficient to deny his application for refugee status. However, even if the panel had erred in its assessment of the facts and evidence, it did not err in its application of the IFA test and its decision would still be valid.

[24] As the respondent indicates, the panel correctly applied the test from *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (CA), for determining whether an IFA existed.

[25] The burden of demonstrating than an IFA is unreasonable is heavy and rests on the applicant (*Vega Zarza v Canada (Minister of Citizenship and Immigration)*, 2011 FC 139 at para 25; and *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164).

[26] The legal test for determining the viability of an IFA is two-fold (*Thirunavukkarasu*, as was recently confirmed in *Martinez Valencia v Canada (Minister of Citizenship and Immigration)*, 2011 FC 203 at para 19). The first part of the test consists in finding an area in the applicant's country of origin in which he or she could live without fearing for his or her life and/or fearing persecution. The panel met this part of the test by suggesting the cities of Cancún, Acapulco, Guadalajara and Monterrey.

[27] The applicant failed to demonstrate to the panel that it would have been unreasonable for him to relocate to one of these cities. The IRB based its decision on all of the evidence in the record.

[28] At paragraph 33 of its decision, the panel stated that even if it had believed the applicant, an IFA was still open to him. The panel indicated that the explanations by the applicant to the effect that he would have been persecuted throughout Mexico were not convincing. The panel found that since the election was over and the applicant was no longer of interest to the union in the months following the election, it was highly unlikely that the applicant would still be persecuted today, in another city and at a different job.

[29] The applicant further argues that the panel erred when it stated that the applicant worked in a computer laboratory during its IFA analysis when he had claimed that his field of employment was labour law.

[30] I do not believe the error regarding the type of employment raised by the applicant had an impact on the IFA decision since the IRB based this on the applicant's years of education and experience to arrive at the conclusion that the applicant could easily find another job elsewhere in Mexico, and not on the type of job.

[31] The panel's finding that there was an IFA falls within the range of reasonable decisions that were open to the panel. I see no error in the panel's reasoning with regard to its application of the IFA test.

[32] For the foregoing reasons, the application for judicial review is dismissed.

[33] The parties did not submit any question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed.

"Richard G. Mosley"
Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-211-11
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