

Federal Court



Cour fédérale

Date: 20120525

Docket: IMM-7945-11

Citation: 2012 FC 633

Toronto, Ontario, May 25, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

J.R.G. AND C.I.V.C.

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] As stated by this Court in *Khoja v Canada (Minister of Citizenship and Immigration)*, 2010 FC 142, 362 FTR 118:

[1] When applying the standard of reasonableness, a court must show deference to the reasoning of a decision under review and must be cognizant of the fact that certain questions before administrative entities and tribunals do not lend themselves to one specific result. As the Supreme Court of Canada explained, reasonableness is concerned with “the existence of justification, transparency and intelligibility within the decision-making process”, as well as “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v. New Brunswick*, [2008] SCC 9, [2008] 1 S.C.R. 190 at para. 47). [Emphasis added].

II. Judicial Procedure

[2] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision made by the Refugee Protection Division of the Immigration and Refugee Board [Board], rendered on October 17, 2011, wherein it was determined that the Applicants were not Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the IRPA.

III. Background

[3] The Applicants, J.R.G and C.I.V.C., aged respectively 33 and 29 years old, are citizens of Mexico and resided in Mexico D.F.

[4] They alleged to be homosexuals and common-law partners. The principal Applicant, C.I.V.C., worked as a reporter for a social events magazine in Mexico. In August 2009, he mistakenly took pictures of a large house, thinking it was that of a well-known star. On September 4, 2009, after his partner picked him up at work, they were stopped by two vans and taken by armed occupants, who were members of the Beltran Leyva cartel [B.L.C.]. The B.L.C members beat them and raped them, asking for the pictures taken of their (B.L.C.) boss's residence.

[5] The Applicants attempted to report the incident without success. They hid at a relative's residence in Cuernavaca, Morelos. After being traced by the B.L.C members, they returned to Mexico and fled to San Francisco, U.S., on October 7, 2009.

[6] Almost ten months later, without having had requested refugee protection in the U.S., the Applicants returned to Mexico on August 3, 2010, subsequently, after hearing on the news that the head of the B.L.C had been killed by the authorities.

[7] The Applicants alleged that, nevertheless, they still received death threats from the B.L.C members. On August 23, 2010, J.R.G. flew to Canada where he claimed refugee protection. The principal Applicant, C.I.V.C., still harassed by the B.L.C members, flew to the U.S., on December 7, 2010, and later crossed the Canadian border, where he claimed refugee protection on December 20, 2010.

IV. Decision under Review

[8] The Board concluded that, as the claim was based on criminality and as the Applicants were not targeted because of their homosexuality, there was no nexus to any of the Convention grounds.

[9] The Board further found that the Applicants' story was not credible because of its lack of plausibility. The Board found that it was not reasonable that the Applicants did not give the pictures to the B.L.C. members when demanded by them. The Board found that it was not credible that the B.L.C. members would have conducted a long harassment campaign instead of confronting the Applicants directly, personally and without delay. With respect to the oral testimony related specifically to the taking of the pictures, the Board found it not credible that the B.L.C. members did not confront the principal Applicant the same day.

[10] The Board found that the Applicants' decision to leave the U.S. and return to Mexico brought into question their subjective fear. The Board also drew a negative inference from the fact that the Applicants had not claimed refugee protection in the U.S. The Board underlined the fact that the Applicants had obtained Canadian visas in September 2009, before any alleged kidnapping had taken place. The Board also noted that the Applicants' relatives in Mexico had not been approached by the persecutors.

[11] With regard to state protection, the Board noted that the Applicants had not taken further action to access state protection once they were discouraged from doing so at the police station.

[12] After reviewing the documentary evidence in light of the case law, the Board noted that the Mexican government takes a variety of measures against criminal organizations. The Board found, furthermore, that Mexico has taken action against sexual orientation discrimination.

[13] Finally, the Board addressed the Applicants' argument that the Board is biased and is statistically more likely to reject Mexican claims. The Board analyzed the case law as to its record in respect of Mexican claimants to reach its conclusion in that regard.

V. Issue

[14] Is the Board's decision reasonable?

VI. Relevant Legislative Provisions

[15] The following legislative provisions of the *IRPA* are relevant:

Convention refugee

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 themselves 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.

Person in need of protection

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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to

Définition de « réfugié »

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.

Personne à protéger

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) 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) soit à une menace à sa vie

a risk of cruel and unusual treatment or punishment if

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 themselves 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.

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.

VII. Position of the parties

[16] The Applicants submit that the Board erred when it found no nexus to a Convention ground. The Applicants argue that they were targeted because of their sexual orientation. They further submit that the credibility findings were erroneous and that the Board ignored relevant evidence such as a medical letter and medical prescription corroborating their allegation of rape, as well as photographs, a report from a clinical counsellor in Toronto and contemporaneous e-mails. With respect to state protection, the Applicants sustain that the Board's analysis did not focus on the treatment of journalists in Mexico, nor did it analyze the effective protection of the bodies cited.

[17] The Respondent submits that the claim was based, not on the Applicants' sexual orientation, but on the fact that they were targeted in Mexico; in addition, the negative credibility findings were based on the distinct discrepancies noted by the Board. The Respondent argues that the determinative issues before the Board were based on credibility and state protection. The Respondent maintains that the Board's failure to discuss the medical letter and the note from a psychologist does not constitute a reviewable error as that evidence does not demonstrate the Applicants' contact with the B.L.C members, nor the fact that they were ever targeted by the B.L.C.; in that regard, the Respondent also points to other elements of the Applicants' claim that the Board held in question as discussed above. The Respondent further specifies that the Board's state protection analysis was rendered as an alternative to its findings on credibility and that analysis is reasonable.

VIII. Analysis

[18] It is trite law that the Board's conclusions with respect to credibility and state protection should be given deference since they rest on assessments of fact. The appropriate standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708).

[19] This Court notes that the present case was based on criminality and not on sexual orientation as it appears from the oral evidence: the Applicants clearly expressed their fear of the B.L.C members (Tribunal Record [TR] at p 517) as a result of taking the pictures. Even after it found no nexus to a Convention ground, the Board analyzed state protection in Mexico with respect to the treatment of homosexuals. Not only did the Board not ignore evidence but it scrutinized the situation as to protection of homosexuals in Mexico (*R.E.A.J. v Canada (Minister of Citizenship and Immigration)*, 2012 FC 209 at para 24).

[20] This Court most strongly disapproves of the use of the word "opportunity" (used by the Board at para 6 of its Decision) to describe a rape; however, that does not vitiate the Board's decision due to its state protection determination in addition to its lack of credibility finding; yet, the lack of sensitivity in the choice of the word used can neither be overlooked, nor left unsaid; it must be signalled as an inappropriate use of language.

[21] In the present case, the Board's credibility finding is clearly based on the implausibility of the Applicants' narrative. This Court in *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (QL/Lexis) (FCA), made the following statement that applies to the present case:

4 There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review... [Emphasis added]

[22] The Board gave numerous reasons in support of the negative inference it drew from the Applicants' voluntary return to Mexico from the U.S. without claiming refugee protection (Board's Decision at para 12). The Applicants have not demonstrated this to be unreasonable.

[23] With regard to the Board's failure to discuss evidence such as the medical letter, the prescription for treatment of the Applicants' injuries, the photographs and the report from the clinical counsellor in Toronto, this Court notes the Board's conclusion on credibility:

[15] [...] The Panel, consequently, does not find a ring of truth in the crucial elements of their story that cover their contacts with Beltran Leyva people and their targeting by this group. The Panel, therefore, does not find, on a balance of probabilities, their fear to be well-founded. [Emphasis added].

[24] The Board did make an allusion to a blanket with a threatening message (Board's Decision at para 9) but did not mention the medical letter, the prescription or the counsellor's report. Although the Board could have been more clear in its citing of the evidence, that would not have changed the conclusion as to the lack of credibility therein. A reading of the Board's decision reveals that the evidence clearly does not contradict its conclusion in regard to plausibility.

[25] Furthermore, the Board conducted an alternative analysis on state protection. This Court has stated that the availability of state protection is a determinative issue (*Sarfraz v Canada (Minister of Citizenship and Immigration)*), [2003] FCJ No 1974 (QL/Lexis).

[26] In the present case, the Board conducted an extensive review of the documentary evidence before coming to its conclusion on state protection. The Board did not err in law in assessing this issue. Furthermore, its analysis was conducted despite the negative credibility finding and in light of the particular context of the case. Indeed, the Board fully considered the sexual orientation of the Applicants as well as the fact that the principal Applicant worked for a magazine. It was reasonable for the Board to conclude that the principal Applicant, because of the nature of his work, did not have the profile of a reporter targeted by criminal organizations (Board's Decision at para 25).

[27] The Applicants essentially propose that this Court have a different point of view on the documentary evidence assessed by the Board. In the present case, as per the above reasoning, this is not a proper ground for judicial review and the intervention of this Court is unwarranted.

IX. Conclusion

[28] For all of the above reasons, the Applicants' application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question of general importance for certification.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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