Federal Court  Cour fédérale

Date: 20150303

Docket: IMM-4903-13

Citation: 2015 FC 266

Ottawa, Ontario, March 3, 2015

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ARNOLDO MAXIMILIANO ASCENCIO GUTIERREZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant's claim for refugee protection was denied by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board). He now applies for judicial review of that decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The applicant seeks an order setting aside the negative decision and returning the matter to a different member of the Board for redetermination.

I. Background

[3] The applicant, born on August 15, 1985, is a citizen of Mexico. He lived in the state of Aguascalientes.

[4] Prior to coming to Canada, the applicant took over his family's real estate business in January 2006. In March 2006, he received extortion threats from the criminal organization La Familia Michoacán (LFM) to pay money to Carlos Zamarripa. After this threat, his father informed the applicant that there is a history of extortion demands. The applicant decided not to comply against the advice from his father. He did not report it to the police but instead sought help from the son of the local mayor and also his friend. It was inconsequential.

[5] In April 2006, the LFM kidnapped the applicant and demanded payment of 25,000 pesos every month or they would kill him. On May 16, 2006, two men approached the applicant, warned him to pay and then hit him. The applicant reported to the police later that day, but police stated they were unable to protect him. On June 5, 2006, he was again kidnapped. The next day, his family helped him to go to Mexico City and on June 22, 2006 he left Mexico to come to Canada.

[6] Since arriving in Canada, the applicant returned to Mexico twice. The first time was for a month from December 2006 to January 2007 and the second time was for a month from January

2008 to February 2008. The first time was to get money from his father to pay for his education in Canada and renew his visa. The second time was also to renew his student visa. On January 23, 2008 while in Mexico City during his second visit, an unidentified person shot at the applicant's car. The police informed him to report the incident in his hometown.

[7] The applicant left Mexico on February 15, 2008 before his student visa was renewed and arrived in Canada on the same day. His student visa was ultimately not renewed. In March 2008, he signed a voluntary deportation form when he met with an immigration officer in Calgary. He stayed in Canada and married a Canadian citizen. His then-wife never filed a spousal sponsorship application. The applicant learned from a community center that he could not file for refugee status while being married to a Canadian citizen. He divorced his then-wife with reasons unclear as to whether or not it was connected to his claim for refugee status. He claimed refugee status on September 27, 2011.

II. Decision Under Review.

[8] The Board refused the applicant's claim and communicated its decision on July 10, 2013.

[9] After summarizing the applicant's claims and its analysis, the Board concluded that it did not find the applicant to be a Convention refugee and/or a person in need of protection.

[10] The Board made its decision and reasoning based on three grounds: i) the lack of subjective fear, ii) credibility issue, and iii) the presence of a viable internal flight alternative (IFA).

[11] First, on the ground of subjective fear, the Board did not accept the applicant's explanations for failing to claim refugee status on his first available opportunity in Canada. Here, the applicant explained that he had a student permit and did not know about refugee protection because he had not spoken with any Spanish speakers in Canada. The Board found the applicant's reason "unsatisfactory and implausible."

[12] Also, the Board found the applicant's reasons for returning on two occasions to Mexico unreasonable and perceived the repeated reavailment being inconsistent with a subjective fear of persecution.

[13] The Board noted the applicant's then-wife, a Canadian citizen, failed to file a spousal sponsorship application on his behalf. The applicant explained his then-wife told him not to worry and he trusted her. He provided into evidence his divorce certificate. The Board found the applicant's explanation "for not making any efforts to acquire status, in light of his alleged fear of persecution, to be unreasonable."

[14] The Board then went on to address the three and one-half years in the applicant's delay in filing for protection after he had arrived in Canada, the last time in 2008. The Board first found it was unreasonable that when the applicant's student visa was not renewed, he did not inquire into other options of staying in Canada. It then found it unreasonable that the applicant divorced his then-wife after he received misinformation from a community center in 2011, advising him that he could not apply for refugee status while married to a Canadian. The Board further stated it found it unreasonable that since 2008, he did not know about applying for refugee protection,

that he did not connect with the Spanish community considering he is an "independent, resourceful, outgoing, educated person".

[15] The Board acknowledged in its reasoning that, "[w]hile delay in claiming is not a decisive factor it is relevant to an assessment of a claimant's subjective fear." The Board's negative inference was based on the applicant's cumulative failures to seek protection when he had the opportunities and the reavailment to Mexico, which it concluded were inconsistent with a showing of subjective fear.

[16] Second, the Board found the applicant had credibility issues. This included that there were family secrets regarding the extortion demands and the fact that no family member resumed the family business after the applicant left. In particular, the Board found it was not plausible that the applicant's family did not inform him of every aspect of running the family business, especially the history of extortion demands. The Board also found the applicant's "explanation for his brothers' decisions not to continue the family business to be unreasonable and not credible."

[17] For these issues, the Board found that it had insufficient reliable or trustworthy evidence to find the applicant faces "a well-founded fear of persecution or credible risk of harm in Mexico today given the demonstrated lack of subjective fear noted above."

[18] Third, the Board found the applicant did have a viable and reasonable IFA in Mexico City, Merida or Hermosillo. In reaching its determination on this issue, the Board relied on

documentary evidence. The evidence provides that the comprehensive personal identification database is lacking in Mexico.

III. Issues

[19] The applicant submits three issues for my consideration:

1. Did the Board err in finding that the applicant had a reasonable IFA?
2. Were the Board's findings on subjective fear unreasonable?
3. Did the Board err in making plausibility findings?

[20] The respondent replies that there is only one issue: "whether the Applicant has raised an arguable case for the success of a future judicial review application."

[21] I prefer the applicant's separation of issues and thereby state the issues as follows:

A. What is the standard of review?

B. Did the Board assess IFA unreasonably?

C. Did the Board assess subjective fear unreasonably?

D. Did the Board assess plausibility unreasonably?

IV. Applicant's Written Submissions

[22] The applicant submits, based on *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the issues in this case are of mixed fact and law, and therefore reviewable on a standard of reasonableness.

[23] The applicant submits that on the issue of IFA, the Board erred in evaluating the two criteria in establishing the existence of an IFA: 1) a serious risk of persecution throughout the country, and 2) a proposed alternative must not be unreasonable given the circumstances of the individual claimant.

[24] First, regarding the presence of a serious risk of persecution throughout the country, the Board did not consider the motivation or other means the LFM might have to track down the applicant beyond an electronic database, such as the widespread reach of gang violence.

[25] Second, regarding whether or not the proposed alternative is unreasonable, the Board did not assess the specific risks to the applicant in the identified IFAs, instead the Board looked at overall corruption or crime rates in the IFAs. Mexico City is an unreasonable identified IFA, because the applicant was shot at while in Mexico City after calling his parents in Aguascalientes. Also, the Board is required to assess the IFAs' reasonableness beyond good employment prospects and lower crime rates.

[26] On the issue of subjective fear, the applicant submits it was unreasonable for the Board to base its finding on a delay in a refugee claim, reavailment and the applicant's ex-wife's failure to apply for spousal sponsorship.

[27] First, regarding the delay in claiming, the applicant cites *Gyawali v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1122, [2003] FCJ No 1387 [*Gyawali*], that a valid temporary status was a legitimate reason for not claiming refugee protection at an earlier opportunity. Here, the applicant had a valid study permit and then got married. As for the subsequent denial of a study permit, it was based on insufficient funding, not because he only remained in school for two months. Also, the applicant's delay was not indicative of a lack of subjective fear, but a lack of knowledge of his legal options.

[28] Second, regarding reavailment, the applicant submits that his return to Mexico lacks voluntariness and an intention to reside there. He cites *Camargo v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1434 at paragraph 35, [2003] FCJ No 1830 at paragraph 35 that "a temporary visit by a refugee to the country where persecution was feared without an intention to permanently reside there should not result in the loss of refugee status." Here, the applicant went back to Mexico the first time to apply for his visa and the second time again to apply for his visa. However, he never returned to his home state at Aguascalientes and did not intend to remain in Mexico.

[29] Third, regarding the applicant's ex-wife's failure to sponsor him, the applicant submits it was "unreasonable for the Member to make such sweeping generalizations about how the

Applicant should have behaved in his marriage." Also, the Board unreasonably considered the applicant's marital breakdown as a solely premised desire to apply for refugee protection.

[30] On the issue of plausibility, the applicant submits the Board did not make a clear distinction between credibility and plausibility findings and the plausibility findings were not based on any clear evidence. He cites *Giron v Canada (Minister of Citizenship and Immigration)*, 2013 FC 7, [2013] FCJ No 5 [*Giron*], which requires there to be a distinction between credibility findings and the threat posed being implausible and that implausibility findings must only be made in the clearest of cases. The applicant submits he wants a clean break in Canada so he did not contact anyone in the Spanish community and such is not outside of the realm of possibility. The applicant argues that the Board's plausibility findings are based on mere speculation and therefore this is a reviewable error under *Ortega v Canada (Minister of Citizenship and Immigration)*, 2012 FC 182, [2012] FCJ No 201. This includes speculation on the lack of continuation of the applicant's family business and the lack of communication on extortion history to the applicant.

V. Respondent's Written Submissions

[31] The respondent submits the standard of review in this case should be reasonableness. Referencing *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*], the respondent submits significant deference should be given to the Board. The respondent argues that the Board did not make any reviewable error.

[32] On the issue of subjective fear, the respondent reiterates the Board's finding that the delay in claiming refugee status is inconsistent with a subjective fear. Relying on *Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 292, [2002] FCJ No 402, the respondent submits the failure to show a subjective fear of persecution is fatal to a claim. It is not unreasonable to expect the applicant to make some inquires about his immigration options in the three and one-half year delay, if he was truly afraid for his life.

[33] For reavailment, the respondent relies on *Kostrzewa v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1449, [2012] FCJ No 1550 [*Kostrzewa*], where the Court in that case found multiple reavailments to the country of persecution undermined an applicant's subjective fear in the absence of a compelling reason for such reavailment. In particular, the respondent emphasizes the similarity between that case and the present case, quoting *Kostrzewa* "[a]lthough Mr. Kostrzewa testified that he had a valid student visa during that period and was unaware of the possibility of applying for refugee protection until shortly before he submitted his application, it was not unreasonable for the Board to draw a negative inference regarding his subjective fear, based on his failure to apply for protection within a reasonable period of time after his arrival in Canada (*Kaur v Canada (Minister of Citizenship and Immigration)* 2012 FC 1379 at para 20; *Duarte v Canada (Minister of Citizenship and Immigration)*, 2003 FC 988 at paras 14-15; *Espinosa v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324 at para 17; *Huerta v Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 271 (CA))."

[34] The respondent further submits that most of the applicant's arguments constitute a request to reweigh the evidence, which is not the role of this Court. It argues that the Board considered all the material before it and the reasons for its decision clearly state why the claim failed.

[35] On the issue of plausibility, relying on *Sellan v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381, [2008] FCJ No 1685, the respondent submits the applicant did not provide independent documentary evidence to alleviate the Board's concerns. It is the Board's role to assess the credibility of the evidence, which includes inconsistencies and contradictions. Further, the applicant has not overcome the presumption that the Board considered all the evidence, and rather, the applicant's argument is based on the assessment of weight assigned to the evidence.

[36] On the issue of IFA, citing *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 [*Rasaratnam*], the respondent agrees with the applicant that there are two criteria in establishing an IFA. The respondent submits the alleged risk of the IFAs to the applicant was properly assessed and the applicant has a high burden to show an IFA location is unreasonable: "[i]t requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions." (see *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 at paragraph 15, [2000] FCJ No 2118). The respondent submits the Board considered the applicant's assertion that if returned, he will be located by the LFM and concluded it as a matter of speculation lacking solid evidence.

VI. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[37] Both parties in this case submit the reasonableness standard should be adopted. I agree. Here, the issues under review are a mix of fact and law. Where the jurisprudence has satisfactorily resolved the standard of review, the analysis need not be repeated (see *Dunsmuir* at paragraph 62).

[38] It has been established in *Dunsmuir*, at paragraph 53, that the standard of reasonableness is applied "where the legal and factual issues are intertwined with and cannot be readily separated." (see also *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 at paragraph 4, 160 NR 315; and *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319, [2012] FCJ No 369 at paragraphs 22 to 40).

[39] The standard of reasonableness means that I should not intervene if the Board's decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (see *Dunsmuir* at paragraph 47). Here, I will set aside the Board's decision only if I cannot understand why it reached its conclusions or how the facts and applicable law support the outcome (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708). As the Supreme Court held in *Khosa* at paragraphs 59 and 61, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

B. *Issue 2 - Did the Board assess IFA unreasonably?*

[40] Pursuant to *Rasaratnam* and further confirmed in *Thirunavukkarasuv Canada (Minister of Employment and Immigration),* in determining whether a reasonable IFA exists, it is well settled that the applicant bears the onus to prove that 1) on a balance of probabilities, there is a serious possibility of persecution throughout the country, including the area which is alleged to afford an IFA; and 2) the conditions in the proposed IFA must be such that it would be unreasonable, upon consideration of all the circumstances, including the applicant's personal circumstances, for the applicant to seek refuge.

[41] Here, I do not agree with the applicant that the Board assessed IFA unreasonably. It seems to me the applicant's arguments are based on the appropriateness in weighing evidence. The applicant submits the Board's determination is unreasonable because it did not consider the motivation or other means the LFM might have to track down the applicant beyond electronic database. Also, he states the Board failed to assess the IFA's reasonableness beyond good employment prospects and lower crime rates. The applicant submits the identified IFA, Mexico City, is unreasonable because of the gang's widespread violence and alternative means to track him. In particular, the applicant asserted during his Board hearing that an unidentified person shot at him during his second visit to Mexico.

[42] As demonstrated from the Board's reasoning, I am satisfied that it considered the evidence before it, including both the documentary evidence and the applicant's assertions. The Board is not required to mention every piece of evidence in the decision (see *Akram v Canada*

(Minister of Citizenship and Immigration), 2004 FC 629 at paragraph 15, [2004] FCJ No 758). Under the standard of reasonableness, my role is not to reweigh the evidence, but to assess whether or not the Board's decision falls within a range of acceptable outcomes. I agree with the respondent that the applicant is asking this Court to reweigh the evidence, which is not my role. Here, the Board ultimately found the proposed IFAs were reasonable. To be reasonable, the Board does not have to come to the same conclusion as the applicant.

[43] Also, I see no reason to infer the Board has either ignored or misconstrued evidence. I find that the Board's conclusion that the agents of persecution do not have the interest, motivation, means or resources to pursue the applicant in the IFA areas does fall within the range of acceptable outcomes.

C. *Issue 3 - Did the Board assess subjective fear unreasonably?*

[44] The Board based its negative inference on subjective fear on two major grounds: i) the delay in the refugee claim and ii) reavailment. In the area of delay, the applicant submits the Board unreasonably inferred from it the lack of subjective fear. The applicant states the delay was reasonable because he had legal student visa status, then married his then-wife and entrusted her to apply for spousal sponsorship. In *Gyawali* at paragraphs 16 and 18, this Court found an applicant's valid temporary status was a legitimate reason for not claiming refugee protection at an earlier opportunity:

> [16] Although case law generally indicates that failure to apply for refugee status immediately upon arrival or within a reasonable delay can be an important factor to consider in determining a claimant's credibility (*Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (FCA) , there exist

> situations in which negative inferences may not be drawn and failure to apply for refugee status immediately upon arrival in a Convention country cannot be the sole basis for questioning a claimant's credibility.
>
> …
>
> [18] In the case at bar, the applicant had a student visa and had also made an application for permanent residency. It is clear that it was not until he lost his financial support from his family in Nepal that he feared having to return there because he could no longer pay for his studies. Clearly there is a direct parallel with the sailor on the ship who is finally given leave and has nowhere to go but home. Both had left home for fear of persecution and had found a safe place to stay and work, so much so that they did not feel the need to apply for refugee status as they were safe for the time being. Suddenly, both found themselves in peril of returning home through circumstances over which they had no power or influence and immediately filed a claim.

[45] On the other hand, the Court in *Kostrzewa* found a valid student visa does not make a board's negative inference unreasonable (see paragraph 33 of these reasons).

[46] Here, I find the present case is more similar to *Kostrzewa* and agree with Chief Justice Paul S. Crampton in *Kostrzewa* that the Board's negative inference falls within the range of acceptable outcomes.

[47] I now turn my analysis to reavailment. In *Kostrzewa*, this Court found multiple reavailments to the country of persecution undermined the applicant's subjective fear in the absence of a compelling reason for such reavailment.

[48] In *Camargo*, this Court found at paragraph 35, "a temporary visit by a refugee to the country where persecution was feared without an intention to permanently reside there should not result in the loss of refugee status."

[49] Here, the applicant went back to Mexico twice, each time for the renewal of his student visa. He did not return to his home state and only stayed in Mexico temporarily for one month each time. In my view, his returns do not constitute reavailment. Since the determination of subjective fear was made based on both grounds of delay and reavailment, I cannot guess what decision the Board would have made if not for this error. Therefore, the Board made an error here.

D. *Issue 4 - Did the Board assess plausibility unreasonably?*

[50] In *Giron*, this Court clarified a distinction between credibility findings and the threat posed being implausible and stated implausibility findings must only be made in the clearest of cases. Mr. Justice Richard Mosley explained in *Santos v Canada (Minister of Citizenship and Immigration)*, 2004 FC 937 at paragraph 15, [2004] FCJ No 1149:

> … [P]lausibility findings involve a distinct reasoning process from findings of credibility and can be influenced by cultural assumptions or misunderstandings. Therefore, implausibility determinations must be based on clear evidence, as well as a clear rationalization process supporting the Board's inferences, and should refer to relevant evidence which could potentially refute such conclusions.

[51] This rationale is again emphasized by this Court in *Ansar v Canada (Minister of Citizenship and Immigration)* 2011 FC 1152, [2011] FCJ No 1438.

[52] Here, the Board found the applicant had credibility issues because of unreasonable explanations related to family secrets regarding the extortion demands and the fact that no family member resumed the family business after the applicant left. The Board found that it had insufficient reliable or trustworthy evidence to find the applicant faces "a well-founded fear of persecution or credible risk of harm in Mexico." These speculations concern the applicant's family dynamic, instead of the refugee claim at hand. I think they were influenced by possible cultural assumptions.

[53] Therefore, I do not see the clear rationalization process supporting the Board's negative inferences. The Board's plausibility findings fail under the review of reasonableness.

[54] Although the Board made errors on the assessment of subjective fear and plausibility findings, these errors are not dispositive of the matter. I have found that the Board's decision with respect to the existence of an IFA for the applicant to be a reasonable decision. This means that the applicant does not have a well-founded fear of persecution in his country of nationality. For a refugee claim to succeed, the applicant must have a well-founded fear of persecution in his country of nationality. Because of the existence of an IFA, he does not have such a fear.

[55] As a result, the applicant's application for judicial review must be dismissed.

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

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
…	…
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	97. (1) A qualité de personne à

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

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 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.

FEDERAL COURT

SOLICITORS OF RECORD

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