Date: 20060406

Docket: IMM-3925-05

Citation: 2006 FC 445

Ottawa, Ontario, April 6, 2006

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

OSCAR HUGO CAMPOS SHIMOKAWA
NANCY VIOLETA COLCA DE CAMPOS
GAIL SAYURI CAMPOS COLCA
SEIKY BERNIE COMPOS COLCA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), wherein the Board determined that the applicants were not Convention refugees nor persons in need of protection according to sections 96 and 97 of the Act, respectively.

[2] The applicants are citizens of Peru. Their claim is based on the following facts.

[3] In May 1994, members of the Shining Path approached the principal applicant in his restaurant in Villa Rica demanding food and money. The principal applicant felt that he was forced to accept their demands because the guerrillas threatened to kill him and his family.

[4] In April 1998, four members of the Shining Path arrived at his restaurant and demanded 5,000 USD, but the principal applicant told them that he did not have the money. They gave him two months to pay.

[5] In May 1998, two policemen from Villa Rica advised him that a detained terrorist had accused him of working with the Shining Path. The police explained that they would have to report the accusation. The principal applicant left his cook in charge of the restaurant and went into hiding with his family in another part of Villa Rica. During the following months, the Shining Path is alleged to have visited the homes of his mother-in-law as well as his parents.

[6] In June 1998, policemen arrived at the restaurant asking for the principal applicant.

[7] In August 1998, as a result of the problems with the Shining Path, the cook closed the restaurant.

[8] On March 27, 1999, the applicants left Peru and went to Japan, where they allege to have suffered a great deal of racial discrimination. In March 2001, the applicants discovered that Japan did not have a refugee programme.

[9] The applicants arrived in Canada on December 16, 2001 and made their claims for refugee protection in January 2002.

[10] With regard to the risk from the Shining Path, the Board found that in the context of the current situation and future risks to the applicants, it was apparent that state protection exists in Peru for persons threatened by the Shining Path and that the Peruvian state had taken steps to combat the terrorist group.

[11] As for the principal applicant's credibility, the Board did not believe his story about being approached by the Shining Path in the persistent and threatening manner that he described. In the principal applicant's handwritten notes to Citizenship and Immigration Canada (CIC) dated March 27, 2002, the principal applicant made no mention of any direct dealings with the Shining Path either in finding work for a suspected member or being extorted and threatened. The applicant made the statement: "There is terrorism in Peru." An additional statement was made to CIC on April 2, 2002, but still no mention of direct dealings with the Shining Path was made. On the other hand, in his personal information form (PIF) narrative, dated May 17, 2002, the principal applicant recounts an elaborate and persistent extortion history. The Board placed more credence on the principal applicant's handwritten notes to CIC than on the PIF narrative.

[12] As concerns the risk from the Peruvian anti-terrorist police, the Board found it difficult to accept that a government agency such as the DINCOTE would have been unable to find the

principal applicant or his family in Peru from July 1998 until the family's departure on March 27, 1999.

[13] The Board found it highly improbable that the police would be looking for the principal applicant at his restaurant in July 1998 and at his parents' home in December 1998 and yet would not notice that two of the applicants had obtained passports in August 1998 (passports having the primary purpose of travel). The Board found it similarly improbable that if the DINCOTE were actually seeking the applicants, they would be able to simply leave Peru by plane. The Board also found that the daughter's testimony contradicted the principal applicant's allegations. Although the PIF narrative states that in December 1998, the DINCOTE went to the principal applicant's parents' home looking for him, the daughter (who was living with his parents' at the time) testified that there was no such visit and that she would have known if such a visit did take place.

[14] The Board concluded that the applicants had failed to provide clear and convincing evidence that there is a serious possibility that state protection would not be reasonably forthcoming. The applicants also failed to show that they had made reasonable efforts to seek state protection. The Board further concluded that the suggestion of Lima as an internal flight alternative (IFA) is reasonable to the applicants.

ANALYSIS

[15] The applicants bring two separate claims of fear of persecution based on two different entities, the first being the Shining Path and the second being the DINCOTE. Although some of the

Board's credibility findings with regard to the Shining Path could give rise to some concern, I am satisfied that the Board's credibility findings with regard to the DINCOTE are sound and cannot be said to be patently unreasonable. I am also of the view that the Board's conclusions with regard to state protection as well as a valid IFA follow sound reasoning.

[16] Where there is state protection available, a claim for refugee protection cannot succeed. As a result, this Court has repeatedly held that the availability of state protection will be determinative of an application for judicial review and, accordingly, that it is not necessary to address the other issues: *Judge v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1089, [2004] F.C.J. No. 1321 (F.C.)(QL) at paras. 4-9; *Muszynski v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1075, [2005] F.C.J. No. 1329 (F.C.)(QL) at para. 6; *Danquah v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 832, [2003] F.C.J. No. 1063 (F.C.)(QL) at para. 12.

[17] Similarly, this Court has held on a number of occasions that the existence of a valid IFA is determinative of a refugee claim and, consequently, the other issues raised by the applicant upon judicial review need not be considered: *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (C.A.), *Hazime v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 2069 (T.D.)(QL) at para. 5; *Ermolenko v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 394, [2004] F.C.J. No. 488 (F.C.)(QL) at para. 8; *Horvath v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1503, [2004] F.C.J. No. 1790 (F.C.)(QL) at para. 7; *Igbinevbo v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1729, [2005] F.C.J. No. 2158 (F.C.)(QL) at para. 5.

[18] In summary, the availability of either state protection or an IFA is determinative of a refugee claim and thus, I believe that these two issues are dispositive of the application before me, rendering the other substantive issues irrelevant. All that will remain is the Guideline 7 procedural issue.

State Protection

[19] The appropriate standard of review for state protection is that of reasonableness simpliciter: *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, [2005] F.C.J. No. 232 (F.C.)(QL).

[20] The applicants submit that the Board erred in finding that state protection is available and cite a number of documents concerning the murder of citizens by guerrilla groups, the change of government in Peru and the regrouping of the Shining Path. The applicants further submit that given their fear of the DINCOTE, to expect them to then turn to the police for protection is unreasonable. In this regard, the applicants cite Justice La Forest in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at paragraph 48 where he states that "it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness."

[21] I agree that in seeking state protection, refugee claimants are not expected to be courageous or foolhardy. It is only incumbent upon them to seek protection if it is seen as being reasonably forthcoming. If the refugee claimants provide clear and convincing evidence that contacting the

authorities would be useless or would make things worse, **they are** not required to take further steps.

[22] In the case at bar, however, the Board made a number of findings of implausibility regarding the applicants' claims with respect to the DINCOTE. The Board found it difficult to accept that the DINCOTE would not have been able to find the applicants over a period of 9 months. The Board also found it highly improbable that the DINCOTE would have been searching for the applicants, but not have noticed that they had obtained passports to leave the country and that ultimately they were able to leave the country by plane. The Board also relied on the daughter's evidence that she did not know of any visit to the principle applicant's parents' home. The Board concluded that the principal applicant's allegation concerning ongoing police searches was probably an exaggeration intended to diminish the need to seek state protection.

[23] While it is true that refugee claimants are generally not expected to seek out state protection when the persecutor is the police authority, the Board did not believe that the applicants were in fact sought out by the police authority and I see no reason to disturb this finding. The Supreme Court in *Ward*, above, provides that the onus is on refugee claimants to provide clear and convincing proof of the absence of state protection to rebut the presumption that such protection exists. The applicants do not bring any other evidence to rebut this presumption and so I must conclude that the Board's conclusion that state protection is available is reasonable.

Internal Flight Alternative

[24] Turning now to the issue of the availability of an IFA, in *Chorny v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 999, (2003), 238 F.T.R. 289, Justice Judith Snider found that the jurisprudence supported a conclusion that the standard with respect to an IFA was patent unreasonableness.

[25] Two criteria must be satisfied in order to conclude that a claimant has an IFA. First, the Board must be satisfied on the balance of probabilities that there is no serious possibility of the claimant being persecuted in the new location. Second, the conditions in the new location must be such that it would not be unreasonable for the claimant to seek refuge there: *Valencia v. Canada (Minister of Employment and Immigration)* (1994), 85 F.T.R. 218 (T.D.).

[26] The applicants argue that the Board failed to properly consider the second prong of the test, specifically, that there does not appear to be any assessment of the reasonableness of Lima apart from the Board's assessment concerning the daughter's lack of problems there up to March 1999.

[27] The applicants further submit that the Board's reliance on the applicant's ability to find employment in Japan and to adapt to new situations is irrelevant to the issue of Lima as an IFA.

[28] I find the Board's conclusion that Lima would constitute a viable IFA not to be patently unreasonable. The Board properly relied on *Ali v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 46 (T.D.)(QL) for the proposition that an IFA can be assessed by

reference to the condition of other family members living there. In this case, the Board found that the daughter had resided openly in Lima for quite some time without any problems. There was no evidence to the contrary, the Board having discounted the principal applicant's evidence that the DINCOTE had looked for him at his parents' home in Lima.

[29] While the Board's mention of the applicants' ability to adapt in Japan was not of great relevance, it was nonetheless evidence showing that the applicants had an aptitude to adapt to a new situation. Further, this comment does not change the Board's assessment that Lima was a valid IFA.

[30] Finally, although the reasons of the Board with regard to the IFA are brief, I am unable to find that the Board's reasoning on this point is "so flawed that no amount of curial deference can justify letting it stand" *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at para. 52.

Guideline 7

[31] A review of the applicants' application for leave and judicial review reveals no mention of the issue of Guideline 7. It is raised for the first time in their further memorandum of argument. It is well established that the Court will deal only with the grounds of review invoked by the applicant in the originating notice and thus, this issue is not properly before the Court: *Arora v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 24 (T.D.)(QL); *Métis National Council of Women v. Canada (Attorney General)*, 2005 FC 230, [2005] 4 F.C.R. 272 at para. 45.

[32] In any event, I note that no objection to the order of questioning was made at any point during the hearing before the Board. In the recent case of *Geza v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, [2006] F.C.J. No. 477 (C.A.) (QL), Justice John Evans most aptly stated that "[p]arties are not normally able to complain of a breach of the duty of procedural fairness by an administrative tribunal if they did not raise it at the earliest reasonable moment. A party cannot wait until it has lost before crying foul." (at para. 66). Therefore, in my view, the applicants have waived their right to now complain about a breach of procedural fairness with respect to the order of questioning.

[33] In the result, this application is dismissed.

JUDGMENT

The application for judicial review is dismissed.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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