Date: 20051027

Docket: IMM-585-05

Citation: 2005 FC 1459

Ottawa, Ontario, October 27, 2005

PRESENT: THE HONOURABLE MADAM JUSTICE SNIDER

BETWEEN:

HENRY MAURICIO GIL OSORIO
CATALINA RESTREPO BOTERO
OSCAR RESTREPO ANGEL (a.k.a. OSCAR RESTREPO)
MARIA EUGENIA BOTERO LONDONO (a.k.a. MARIA E. BOTERO LONDONO)
ESTEBAN RESTREPO BOTERO
MARIANITA RESTREPO BOTERO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicants are citizens of Colombia and comprise an extended family, all of whom base their refugee claim on a fear of persecution by the Revolutionary Armed Forces of Colombia

("FARC"). The principal Applicant and his wife (Oscar and Maria Eugenia) are common-law spouses with three children. The eldest (Catalina) child is married to the Applicant son-in-law (Henry Mauricio). In a decision dated January 10, 2005, a panel of the Immigration and Refugee Board, Refugee Protection Division (the "Board") determined that the Applicants were neither Convention refugees nor persons in need of protection.

Issues

[2] The Applicants raise the following issues:

1. Did the Applicants fail to receive a fair hearing of their claim, in accordance with the principles of natural justice, because of the manner in which their claim was dealt with by the Board?

2. Did the Board err in its assessment of the Applicant son-in-law's claim:

    (a) by rejecting or ignoring the explanation of the Applicant son-in-law that he did not believe he would risk his U.S. visa application by visiting Canada, and by basing its finding of a lack of subjective fear on that error; or

    (b) by applying an incorrect test for risk assessment when it concluded that the Applicant son-in-law, as a father of a young child, did not face a risk greater than all parents in Colombia?

3. Did the Board err in its assessment of the Applicants' risk by failing to consider evidence of risks to businessmen in Colombia?

Analysis

***Issue #1*: *Did the Applicants fail to receive a fair hearing of their claim*?**

[3] The Applicants, except for the Applicant son-in-law, arrived in Canada from the United States in March, 2001 and immediately made refugee claims. The Applicant son-in-law arrived on April 27, 2001, also from the United States, and made his claim on April 30, 2001 when he was refused re-admission to the United States.

[4] Scheduling of the hearing was difficult. For reasons that are not well-explained in the record, the hearing of their claims did not begin until June 29, 2004. The first day of the hearing was ended earlier than would have been the usual practice of the Board due to a previously-scheduled appointment of the Refugee Protection Officer ("RPO"). The resumption of the hearing was scheduled for September 28, 2004. When the Applicants, their counsel and the RPO presented themselves on that date, the panel did not appear. Subsequently, the Applicants were advised that the member was ill. Re-scheduling the second day of hearing was fraught with delays and confusion. In November 2004, when the resumption of the hearing was again threatened with postponement, the Applicants advised that they wished to accept the offer of the Board to start the hearing *de novo* after the Board had unilaterally cancelled a hearing date. Finally, the second day of hearing took place on November 30, 2004; this was a full day that extended beyond the usual sitting hours.

[5] The Applicant submits that, because of this “improper treatment” by the Board before and during the hearing process, they were not afforded a fair hearing. The Applicants also refer to “abusive and sarcastic” incidents of questioning by the Board. While they acknowledge that the questioning likely does not, in and of itself, amount to a breach of fairness, they argue that the cumulative effect of the procedural difficulties and the abusive questioning is a breach of procedural fairness.

[6] To begin this analysis, I do not agree with the Applicants that the manner of questioning should be considered cumulatively with the other administrative problems experienced by them in the processing of their claims. There is no link, in my mind, between the scheduling difficulties and the manner of questioning in the hearing. Other than her illness on September 28, 2004 – which was not within her control - there is no evidence that this particular panel of the Board was the cause of the scheduling disruptions or that this panel acted in bad faith in the hearing process.

[7] With respect to the manner of questioning during the hearing, based on my review of the transcript, the questioning by the Board comes nowhere near satisfying the test for a reasonable apprehension of bias. That test, paraphrased from the widely-accepted views of Justice de Grandpré in *Committee for Justice and Liberty v. Canada* (*National Energy Board*) [1978] 1 S.C.R. 369, at p. 394, is whether an informed person, viewing the matter realistically and practically – and having thought the matter through – would conclude that it is more likely than not that the Board, whether consciously or unconsciously, would not decide fairly. It is true that the transcript contains a few examples of comments that, taken in isolation, appear to be sharply-worded. However, when read in context, each of these incidents can be explained on the basis of the complexity of the proceeding,

the desire of the Board to clarify seemingly inconsistent testimony or the efforts of the Board to manage a complex proceeding with six applicants (five of whom testified). Even the Applicants acknowledge that the manner of questioning does not approach that criticized by the Court in *Herrera v. Canada* (*Minister of Citizenship and Immigration*) [2005] F.C.J. No. 118 or *Sandor v. Canada* (*Minister of Citizenship and Immigration*) [2004] F.C.J. No. 2183. The actions of the Board in its questioning, in this case, do not demonstrate a reasonable apprehension of bias.

[8] This leaves, for consideration, the arguments that the hearing process in this case was so poorly managed that the Applicants were treated unfairly. In my view, to constitute grounds for overturning a decision, a lack of fairness must be identifiable in terms of the negative impacts on or prejudice to the affected person. For example, a failure to allow a claimant to present his evidence may be a breach of a claimant's right to be heard and, thus, a breach of procedural fairness. Delays in a proceeding which result in the disappearance of witnesses or an impairment of memory that occurs with time may be sufficient to show a breach of procedural fairness. Each case must be examined on its merits and, in each case, there must be a connection between the mistreatment and prejudice to the Applicants.

[9] In the application before me, the Applicants have not demonstrated that there is a link between the decision rendered by the Board in their case and the alleged lack of integrity in the Board's processing of their claims. There is no evidence that the decision or the hearing was affected by the flawed procedures. The Applicants do not argue, for example, that evidence was improperly excluded, that they were not permitted to submit documentary evidence, or that certain

family members were not allowed to testify. Any of these actions could reasonably be expected to cause prejudice to the Applicants.

[10] In this case, the treatment of the Applicants by the employees of the Board appears to have been deplorable. For long periods of time, there was no communication. The hearing was unilaterally re-scheduled on short notice. On one occasion, parties showed up for the hearing only to be advised that the member was ill. There was no response to concerns about the process expressed by counsel for the Applicants. Nevertheless, the Applicants concede that they are not able to show the "traditional markers of prejudice". Absent one or more of those "traditional markers", it is not possible to show that the Applicants did not have a fair hearing of their claims.

[11] The Applicants submit that the cumulative impact of the many procedural problems and the manner of questioning is that the Board was in breach of its duty "to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system" (*Guermache v. Canada* (*Minister of Citizenship and Immigration*), [2004] F.C. 870, at para. 4). This is, in essence, an argument that the Board's behaviour amounts to an abuse of process which can, in certain circumstances, constitute an error even where the fairness of the hearing is not directly compromised.

[12] Similar arguments were made to the Supreme Court of Canada in *Blencoe v. British Colombia* (*Human Rights Commission*) [2000] 2 S.C.R. 307, a case involving a delay by the British Colombia Human Rights Commission in holding a hearing into alleged human rights violations.

Mr. Blencoe, *inter alia*, argued before the court that the unacceptable delay amounted to an abuse of process. In considering this ground for review, Justice Bastarache stated at para. 115:

> I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. [Emphasis added.]

[13] The Board's handling of the Applicants' claim was less competent than one would expect from such an important public institution. The problems described by the Applicants in this case constitute unacceptable behaviour from Canada's public servants. However, it falls far short of the threshold described in *Blencoe*, *supra*. The problems of the Applicants were specific to their case – a complicated case involving many different interests – and do not exemplify a systemic breakdown of the Board's normal procedures. I am unable to conclude that the entire refugee claim process in Canada is brought into disrepute by the actions of those employees and the Board member responsible for overseeing the Applicants' file.

[14] In brief, the Applicants have failed to convince me that the unfairness in the process they experienced was a reviewable error for purposes of this judicial review. They have not persuaded me: (a) that they suffered prejudice due to the actions of the Board; or (b) that the actions of the Board, in the circumstances of this case, brought the entire refugee claim system into disrepute.

***Issue #2*: *Did the Board err in its assessment of the Applicant son-in-law's claim*?**

Background of the Applicant son-in-law's claim

[15] The Applicant son-in-law asserts a fear of persecution by the FARC. In particular, he claims that the FARC attempted to recruit him while he was at school in Armenia in 1998. He claims to have witnessed a shooting in a restaurant that killed his best friend. The Applicant son-in-law left Colombia on December 24, 1998 for the United States, where he became the subject of a visa sponsorship application initiated by his grandparents. At the time that the Applicant son-in-law entered Canada from the United States, he was in the process of applying for a U.S. visa. On April 27, 2001, he came to Canada to visit Catalina, whom he had met in the United States. When he attempted to return to the United States on April 29, 2001, the US INS discovered that he had been illegally working in the United States. He chose to remain in Canada when U.S. border officials advised that he would be placed in detention if he entered the United States. The Applicant son-in-law claimed refugee status on April 30, 2001 on the basis of a well-founded fear of persecution in Colombia from the FARC. He is now married to Catalina.

Board's Findings on the Applicant Son-in-law's Claim

[16] In rejecting the Applicant son-in-law's claim, the Board was not persuaded that the FARC had any interest in him. The Board referred to the evidence that the Applicant son-in-law continued to live at the same address and to attend school for several months after the relevant incidents. The Board also stated that it lacked "credible evidence that the shots fired at the restaurant were meant for [the Applicant son-in-law], given the lack of any follow up [by the FARC] during the four months following that incident". In addition, the Board found that the Applicant son-in-law's travel

to Canada from the United States, while his visa application was outstanding, “does not indicate a subjective fear of persecution.”

[17] In sum, the Board was not persuaded that the Applicant son-in-law had a well-founded fear of persecution by the FARC. Further, the Board questioned his subjective fear on the basis that the son-in-law had put his visa status in the United States at risk by visiting Catalina in Canada. The Board found that this behaviour belied the Applicant son-in-law’s claim of a subjective fear of persecution.

Applicant son-in-law’s Visit to Canada from the United States

[18] The Applicants contend the Board erred in finding that the Applicant son-in-law’s choice to visit Canada was inconsistent with a subjective fear of persecution for the reason that it put his U.S. visa at risk. The Applicants submit that the Board ignored evidence put forth by the son-in-law that he thought he would not run into any problems.

[19] The Applicants are correct that there are no specific references in the Board’s reasons to the explanation given by the son-in-law that a friend had been able to visit without difficulty. Given the length of time that the son-in-law had been in the United States and his evident knowledge of U.S. immigration rules and regulations, the Board’s conclusion is not, in my view, unreasonable. Nevertheless, it would have been preferable for the Board to explicitly refer to the explanation and explain why it was rejected. However, in this case, any error by the Board on this question is immaterial. This is because the Board’s decision rests primarily on its conclusion that the son-in-law failed to convince the Board of the basis of his claim. Any conclusion related to the son-in-

law's reasons for coming to Canada is supportive – but not determinative – of the Board's decision. There is no reviewable error.

Generalized risk

[20] In making his claim to the Board, the Applicant son-in-law asserted a fear on behalf of himself and his young Canadian-born son, should they return to Colombia. With respect to the interests of the child, the Board accurately stated that the interests of the son-in-law's Canadian-born child are "more appropriately addressed through channels other than this panel". Concerning the impact on the son-in-law caused by having a young child with him in Colombia, the Board stated:

> Counsel suggested, in her submissions, that it would be indirect cruel and unusual treatment/punishment for [the son-in-law] to have to return to Colombia because of the psychological stress that would be on him as a parent worrying about the welfare of his son. The panel finds that the risk of this is a general risk faced by all parents in Colombia based on the on-going civil war, and that there is no evidence before it that [the son-in-law] faces a risk greater than all parents there.

[21] The Applicants submit that the Board erred in applying the test under s. 97(1)(b)(ii) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 which requires that, for a person to be in need of protection, they face a risk that is "not faced generally by other individuals in or from that country." In their submission, the Board erred by equating the phrase "faced generally by other individuals" with "faced generally by all parents." In support, the Applicants cite a decision of the Board where the Board found a claimant couple was at risk of cruel and unusual treatment because of the risk of their children being kidnapped (*I.D.Q. (Re)*, (2002) R.P.D.D. No. 189).

[22] I first note that the Board, in the paragraph concluding this section of their Reasons, states its finding that the risk of the son-in-law "is no greater than or different to the general risk faced by

all persons in [Colombia].” From this, it appears that the Board understood the correct test. The question is whether a risk to a sub-group – in this case, parents – can be a risk contemplated by s. 97(1)(b)(ii). The Board evidently believed that it is. The question before me is whether this extension of the concept of “faced generally” was correct or reasonable. In my view, it was.

[23] I do not find the case of *I.D.Q.*, *supra* to be of assistance. In *I.D.Q.*, *supra*, the claimants were Colombian nationals who claimed a well-founded fear of persecution from FARC. The children, in that case, had been the victims of kidnapping attempts. The panel found that there was a serious possibility that the children would be kidnapped should they return to Mexico and continued on to find that, “should any of the children be kidnapped and harmed, the adult claimants will likely suffer severe psychological trauma.” On the basis of these two findings, the panel found that the children and the parents were persons in need of protection. The case before me is distinguishable from *I.D.Q* on its facts. The parents in that case were facing a specific and personal risk from the criminals who had attempted to kidnap their children.

[24] It seems to me that common sense must determine the meaning of s. 97(1)(b)(ii). To put the matter simply: if the Applicants are correct that parents in Colombia are a group facing a risk not faced generally by other individuals in Colombia, then it follows that every Colombian national who is a parent and who comes to Canada is automatically a person in need or protection. This cannot be so.

[25] The risk described by the Applicants and the Board in this case is a risk faced by millions of Colombians; indeed, all Colombians who have or will have children are members of this

population. It is difficult to define a broader or more general group within a nation than the group consisting of “parents”.

[26] Further, I can see nothing in s. 97(1)(b)(ii) that requires the Board to interpret “generally” as applying to all citizens. The word “generally” is commonly used to mean “prevalent” or “widespread”. Parliament deliberately chose to include the word “generally” in s. 97(1)(b)(ii), thereby leaving to the Board the issue of deciding whether a particular group meets the definition. Provided that its conclusion is reasonable, as it is here, I see no need to intervene.

[27] In conclusion, the Board reasonably concluded that the risk to which the son-in-law and his wife would be subject is a general risk and does not make them persons in need of protection under s. 97.

***Issue #3*: *Did the Board err in its assessment of the Applicants' risk by failing to consider evidence of risks to businessmen in Colombia*?**

[28] The Applicants assert that the Board committed a fatal error by not considering the risk to the Applicants based on the fact that the principal Applicant was the owner of a small business. The Applicants refer to a number of instances in the documentary evidence demonstrating that owners of small businesses are targeted for kidnapping by the FARC, even in Bogotá which was found, by the Board, to be an internal flight alternative (“IFA”).

[29] I am not persuaded that there was an error. The Board assessed the possible risk to the Applicants in Bogotá on the basis of the evidence presented by the principal Applicant. That

evidence included an admission by the principal Applicant that he could find employment in Bogotá. In other words, the principal Applicant's own testimony was that he would not necessarily own and operate his own construction business if he returned to Colombia and lived in Bogotá. Even if the principal Applicant had been targeted in the past by the FARC as a businessman, the evidence before the Board supported its finding that he did not need to own his own business in order to practise his skills at interior construction. As such, it was not unreasonable for the Board to find that Bogotá was a viable IFA. In this context, there was no need for the Board to refer to the evidence related to the targeting of business owners.

Conclusion

[30] For these reasons, the application will be dismissed.

The Applicants propose the following question for certification:

> Can a breach of the right to a fair hearing in accordance with the principles of natural justice be made out, even in the absence of actual prejudice to the Applicants where, on the facts of the case, the board has proceeded prior to and during the hearing in such an unfair manner that justice has not seen to be done?

[31] The Respondent opposes the certification of this question.

[32] As discussed above, while the Board's administrative practices were not appropriate, they did not, in my view, rise to the level of unfairness such that justice was not seen to be done. Accordingly, the question of whether such unfairness could lead to a breach of the right to a fair hearing is not determinative. The question will not be certified.

ORDER

THIS COURT ORDERS that:

1. The application is dismissed; and

2. No question of general importance is certified.

Judith A. Snider

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Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-585-05
STYLE OF CAUSE:	HENRY MAURICIO GIL OSORIO et al v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 5, 2005
REASONS FOR ORDER AND ORDER:	Snider J.
DATED:	October 27, 2005

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