Date: 20071001

Docket: IMM-782-07

Citation: 2007 FC 979

Ottawa, Ontario, October 1st, 2007

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

WILLIAM ALEXANDER CRUZ HERRERA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated January 23, 2007. The Board concluded that the applicant was neither a Convention refugee nor a person in need of protection, pursuant to sections 96 and 97 of the Act respectively, due to a lack of credibility. In addition, the Board found that the applicant's behaviour was incompatible with a subjective fear of persecution.

[2] Although the decision and the memoranda are in French, the applicant asked that the hearing be conducted in English. The reasons will therefore be written in English.

ISSUES

[3] The parties' submissions reveal three issues:

a) Did the Board err by making adverse findings of credibility in a perverse and capricious manner, on irrelevant considerations, or without regard to the totality of the evidence before it?

b) Did the Board err by drawing a negative inference regarding the applicant's subjective fear of persecution?

c) Did the Board err by failing to conduct a separate analysis under subsection 97(1) of the Act?

[4] For the following reasons, the answer to the three questions is negative and the present application will be dismissed.

BACKGROUND

[5] The applicant is a citizen of El Salvador who seeks asylum in Canada because he fears persecution in his home country on the ground of his sexual orientation.

[6] In 2001, the applicant entered into a relationship with a young man by the name of Miguel Antonio El Pina, who was a member of a gang known as the Maras La Mara 18 (Mara). Their relationship lasted approximately one year. When other members of the Mara learned of their

relationship, they tortured, assaulted and killed Miguel Antonio El Pina, and forced the applicant to watch. They also beat and sexually assaulted the applicant on several occasions.

[7] In the spring of 2001, he left for the United States where he was granted Temporary Protective Status. He remained in the United States for five years by renewing his temporary status.

[8] He arrived in Canada on April 19, 2006. On his arrival, he declared that conflict stemming from the distribution of his stepfather's inheritance was his reason for fleeing El Salvador. Shortly after his entry into Canada, the applicant made a claim for refugee status on the grounds that he feared persecution because of his sexual orientation. The discrepancies between the facts related by the applicant in support of his claim are at the heart of the issue before the Court. The denial of his claim by the Board forms the basis of this application for judicial review.

DECISION UNDER REVIEW

[9] The Board denied the applicant's claim, concluding that he was not credible. The following are the key matters which the Board found to be detrimental to his credibility:

a) The applicant omitted from his Personal Information Form (PIF) the fact that he lived in the United States between 2001 and 2006. Rather, he initially declared he had always lived in El Salvador, from 1981 until 2006. It was subsequently revealed in the psychological report of Dr. Valenzuela that he had entered the United Stated five years prior to his arrival in Canada. This was confirmed by his testimony;

b) The applicant stayed in the United States for five years without making a claim for asylum. He first said the process was too costly, and subsequently testified that he never thought of making such a claim;

c) The applicant provided contradictory testimony regarding an incident relating to his stepfather. In his PIF, he stated that the Mara visited his stepfather's home in May 2005, which caused his stepfather to be hospitalized and precipitated his death in June 2005. The applicant admitted before the Board that the Mara visited the home in 2001, and that his stepfather passed away in 2006;

d) The applicant further contradicted himself when he stated in his PIF that his stepfather's sons from a previous marriage blamed him for hastening the death of the stepfather. However, when he was interviewed at the border upon his arrival to Canada, the applicant maintained that the sons born from a previous marriage threatened his life if he did not give them inheritance money to which they felt they were entitled;

e) The applicant testified that he watched his partner, Miguel Antonio El Pina, be tortured, but that this was not mentioned in his PIF;

f) Finally, the Board questioned the lack of evidence, such as a news story reporting the death of Miguel Antonio El Pina, or hospital records detailing the injuries suffered by the applicant.

[10] When asked why he did not reveal his stay in the United States to the border officials, the applicant explained that he was told by people in Canada that such a disclosure would hinder his

chances of making a successful claim, and advised that he lied. He was unable to explain the diverging stories regarding the question of his stepfather's inheritance. When asked why he did not make a claim for refugee status in the United States at any time during his five-year stay, he first said it was too costly, and then changed his answer, saying that he had never considered the possibility.

[11] The Board found the applicant's explanation insufficient to justify a five-year stay in the United States without seeking asylum, and that this omission eroded the applicant's pretension that he has a subjective fear of persecution.

[12] The Board concluded for the above-mentioned reasons that there was a complete lack of credibility on the part of the applicant:

> Pour toutes ces raisons, le demandeur n'a pas fait la preuve d'une possibilité sérieuse de persécution en cas de retour dans son pays.
>
> De plus, le tribunal conclut qu'il n'existe pas de possibilité sérieuse que le demandeur soit torturé ou exposé à une menace à sa vie ou à des traitements et peines cruels et inusités au El Salvador parce qu'il n'a pas été trouvé crédible sur les points fondamentaux de sa demande d'asile.

[13] The reasons of the Board did not include a specific analysis of subsection 97(1).

ANALYSIS

Did the Board err by making adverse findings of credibility in a perverse and capricious manner, on irrelevant considerations, or without regard to the totality of the evidence before it?

Standard of review

[14] When the Board makes a determination regarding the credibility of a refugee claimant, the decision will be reviewed by the Court using the standard of patent unreasonableness. This standard has been confirmed by the Federal Court of Appeal in *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 at paragraph 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. […]

Adverse finding of credibility

[15] Taken as a whole, the Board's adverse findings of credibility, based on the numerous discrepancies between the applicant's point of entry interview, PIF, and testimony, cannot be characterized as patently unreasonable.

[16] A review of the transcripts of the applicant's testimony, and point of entry interview, as well as the PIF, confirm the Board's assessment of conflicting facts, including versions which were recounted to deliberately mislead Canadian immigration authorities. However, one ground upon which the Board drew its negative inference of credibility merits closer examination; the Board wrote in its reasons:

> En outre, le demandeur témoigne qu'il a été témoin de la torture de son ami Miguel membre de la Mara.
>
> Or, dans son histoire que l'on retrouve dans son FRP, il ne parle pas du tout de cet événement de torture.

[17] A review of the applicant's PIF discloses the following statement made at lines 35 through 41:

> Miguel Antonio était membre d'une bande de Maras, la MARA 18. Notre relation a duré un an. Quand les autres membres ont découvert notre relation homosexuelle, ils ont violé et tué Miguel Antonio El Pina. Quant à moi, les membres de la MARA 18, m'ont violé et battu avant de me jeter devant le motel qui appartient à la mère de Gloria Elizabeth.

[18] Despite the fact that he did not qualify the experience as torture, the applicant's disclosure of sexual assault and beating suggests that he was subject to extreme violence. Furthermore, a psychological report prepared by Dr. Martha Valenzuela for the Board outlines the reason why the applicant would minimize his description of the abuse (page 6):

> Regarding the question whether Mr. Cruz' symptoms may interfere with his ability to testify, this may be significantly affected. He appears prone to anxiety and as soon as he refers to the aggression and torture perpetrated on his partner, he becomes tearful and unable to talk. […] The helplessness and guilt regarding the humiliation and debasement he was forced to witness and to endure, may invade him to the point of impinging on his ability to construct a coherent narrative. […]

[19] Granted the extreme violence to which the applicant was subjected, and in light of the passages from the PIF and the psychological report, the court finds that it was

unnecessary for the Board to require from the applicant that this experience be qualified specifically as torture.

[20] Because the Board relied on five other grounds which were supported by the evidence, I find that the Board did not err in coming to an adverse finding of credibility and denying the section 96 claim. The applicant's extended stay in the United States without seeking asylum is particularly persuasive. His failure to disclose this at the point of entry erodes his credibility considerably.

Did the Board err by drawing a negative inference regarding the applicant's subjective fear of persecution?

[21] The Board determined that the applicant's claim could not be granted, because the applicant lived in the United Stated, state party to the *1967 Protocol relating to the Status of Refugees*, for a period of five years, without making a claim for refugee status in that country. The decision referred to the following passage from *Ilie v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1758 (QL). The Board wrote:

> Le défaut d'un demandeur de revendiquer le statut de réfugié dans un pays signataire du *Protocole de 1967* contredit la prétention selon laquelle il craint d'être persécuté.

[22] While a determination of the existence of subjective fear is based on the claimant's credibility (*Canada (Minister of Citizenship and Immigration) v. Elbarnes*, 2005 FC 70, [2005] F.C.J. No. 98 (QL); *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689), negative inferences may also be drawn from a claimant's failure to bring a claim promptly (*Mejia v. Canada (Minister*

of Citizenship and Immigration), 2006 FC 1087, [2006] F.C.J. No. 1365 (QL); *Manokeran v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 111, [2006] F.C.J. No. 146 (QL); *Munoz v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1273, [2006] F.C.J. No. 1591 (QL)). It was reasonable for the Board to conclude that a five-year stay in the United States without making a claim indicates a lack of subjective fear.

[23] I agree with the respondent's submission that the absence of subjective fear may also be fatal to a refugee claim, beyond the simple negative inference of credibility. In *Kamana v. Minister of Citizenship and Immigration*, [1999] F.C.J. No. 1695 (T.D.) (QL), Tremblay-Lamer J. held at paragraph 10:

> The lack of evidence going to the subjective element of the claim is a fatal flaw which in and of itself warrants dismissal of the claim, since both elements of the refugee definition--subjective and objective--must be met.

[24] *Kamana*, above has subsequently been cited with approval (*Akacha v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1489, [2003] F.C.J. No. 1897 (QL) at paragraph 5; *Houssou v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1375, [2006] F.C.J. No. 1730 (QL) at paragraph 32).

[25] It was reasonable for the Board to conclude that the applicant's failure to make a refugee claim in the United States, despite the fact that he remained in the country for five years, presents a critical barrier to a claim under section 96 of the Act. While the applicant's lack of subjective fear

properly disposes of his claim under section 96, the subjective element is not required in order to conclude that a claimant is a person in need of protection under subsection 97(1).

Did the Board err by failing to conduct a separate analysis under subsection 97(1) of the Act?

[26] The applicant submits that it was incumbent on the Board to perform a separate analysis under subsection 97(1) of the Act, to determine whether he is a person in need of protection. The applicant relies on *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211, [2003] F.C.J. No. 1540 (QL) at paragraph 41:

> A claim under section 97 must be evaluated with respect to all the relevant considerations and with a view to the country's human rights record. While the Board must assess the applicant's claim objectively, the analysis must still be individualized. I am satisfied that this interpretation is not only consistent with the United Nations CAT decisions considered above, but is also supported by the wording of paragraph 97(1)(a) of the Act, which refers to persons, "...whose removal ... would subject them personally...". There may well be instances where a refugee claimant, whose identity is not disputed, is found to be not credible with respect to his subjective fear of persecution, but the country conditions are such that the claimant's particular circumstances, make him/her a person in need of protection. It follows that a negative credibility determination, which may be determinative of a refugee claim under s. 96 of the Act, is not necessarily determinative of a claim under subsection 97(1) of the Act. The elements required to establish a claim under section 97 differ from those required under section 96 of the Act where a well-founder fear of persecution to a convention ground must be established. Although the evidentiary basis may well be the same for both claims, it is essential that both claims be considered as separate. A claim under section 97 of the Act requires that the Board apply a different test, namely whether a claimant's removal would subject him personally to the dangers and risks stipulated in paragraphs 97 (1) (a) and (b) of the Act. Arguably, the Board may also be required to apply a different standard of proof, which is an issue that I will leave for another day, since it was not argued on this application. Whether a Board properly considered both claims is a

> matter to be determined in the circumstances of each individual case bearing in mind the different elements required to establish each claim.

[27] In the present case, the Board concluded that there was a total lack of credibility on the part of the applicant, and as such, they disbelieved that there was a serious risk of torture, risk to his life or to a risk of cruel and unusual treatment or punishment if he were to return to El Salvador. If the evidence upon which a determination under subsection 97(1) is not found to be credible, the Board is not required to perform a separate analysis. This was confirmed in *Kaur v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1710, [2005] F.C.J. No. 2112 (QL), at paragraph16:

> With respect to the lack of a distinct analysis regarding subsection 97(1), the Board was entirely justified not to undertake that exercise from the moment where it determined that the applicant was not credible. If the Board was correct on that point, it is clear that the applicant could not have been considered to be a person in need of protection. Incidentally, that is what this Court has determined on numerous occasions: *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1540; 2003 FC 1211 (QL); *Soleimanian v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 2013; 2004 FC 1660 (QL); *Brovina v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 771, 2004 FC 635 (QL).

[28] I have determined that the Board's adverse findings of credibility are reasonable. It cannot be said that there is no analysis in the case at bar under section 91(1). The decision is very succinct, but the conclusion of a total lack of credibility and the absence of a proof that might link the general documentary evidence to the applicant's specific circumstances justify the Court to conclude that the Board did not err when it dismissed the applicant's claim under subsection 97(1) of the Act (*Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 808, [2004] F.C.J. No. 995 (QL)).

[29] The parties did not submit questions for certification and none arise.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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