

Date: 20050824

Docket: IMM-7624-04

Citation: 2005 FC 1166

Halifax, Nova Scotia, this 24th day of August, 2005

PRESENT: THE HONOURABLE MR. JUSTICE JOHN A. O'KEEFE

BETWEEN:

MAIKEL CHAVARRIA CHAVARRIA

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

O'KEEFE J.

[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 (“IRPA”), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the “Board”), dated April 15, 2004, wherein it was determined that the applicant is not a Convention refugee nor a person in need of protection.

[2] The applicant is seeking an order setting aside the Board's decision and referring the matter back for redetermination before a newly constituted panel in accordance with such directions as the Court deems appropriate.

Background

[3] The applicant, Maikel Chavarria Chavarria (the "applicant") is a citizen of Costa Rica. The applicant claimed to fear his former girlfriend and her father. He further alleged that state protection would not be available to him if he returned to Coats Rica.

[4] In 2002, the applicant separated from his wife and moved into his grandmother's house. While separated from his wife, the applicant began dating Mauren Zamora Sotela ("Mauren"). The applicant alleged that Mauren was very jealous and possessive of him. The applicant alleged that in November 2002, Mauren arrived at the applicant's jewellery store and found him there with his wife and child. She hit him and later made him promise to never leave her. The applicant was concerned but they continued dating.

[5] The applicant alleged that another incident with Mauren occurred in December 2002 at which point he told Mauren that he no longer wanted to continue the relationship. Mauren told him that if he left, she would kill herself and would also tell her father (Rafael Zamora Sanchez) a former police delegate, that the applicant had raped her. The applicant secured a temporary travel document and went to Mexico, returning to Costa Rica on January 3, 2003.

[6] The applicant alleged that on January 6, 2003, he was attacked near his grandmother's home by two police officers on Mauren's behalf (her father was also

there). He further alleged that the police warned him that he had to return to Mauren or he would regret the consequences. The applicant lost consciousness and awoke at a medical clinic in San Jose. The applicant subsequently moved into his uncle's house.

[7] The applicant further alleged that after he had secured his passport in mid-February 2003, two uniformed members of the Rural Guard went to his uncle's house claiming there was an arrest warrant for the applicant on charges of rape. The applicant escaped through the back garden and went to stay with a family friend in another city. He stayed there for a month and alleged that he learned from his grandmother and his wife that during that time, the police had gone to their houses to look for him to arrest him. The applicant subsequently reconciled with Mauren in an attempt to convince her he was back with her for good. He alleged that she subsequently called off her father and the police.

[8] The applicant left Costa Rica and arrived in Canada on April 24, 2003. He made a claim for refugee protection on May 2, 2003. The applicant alleged that he had heard that since he has been in Canada, Mauren has found out where he is, has contacted his aunt and wife, there was a failed attempt to abduct his daughter, and the police have visited the applicant's uncle threatening that the applicant would pay for upsetting Mauren and her father.

Reasons of the Board

[9] The Board stated that the determinative issue in the case was whether state protection would be forthcoming. The Board found that contrary to the applicant's

assertions, the documentary evidence clearly indicated that state protection would reasonably be available to the applicant in Costa Rica. The Board stated that when the applicant's evidence differed from that found in the documentary evidence, the Board preferred the documentary evidence as it came from a variety of reliable, independent sources which, unlike the applicant, have no interest in the outcome of the proceedings.

[10] The Board noted that the evidence showed that Mauren's father worked for the Ministry of Government, Police and Public Security between 1983 and 1986, then for six months between November 1989 and May 1990, and again for four months between June 1994 and October 1994 when he retired. The Board then stated:

. . . Although the claimant indicated that he was afraid of Mauren, her father and his past connection with the police, the claimant's knowledge of Mauren's family was very vague. The claimant knew what Mauren's father did in 1994, but he was completely unaware about his Rafael Zamora's life during the time Mauren was his girlfriend. The claimant indicated that Mauren once told him that her father was a business man, but he did not know anything else. The claimant never went to Mauren's home, he never lived with her he did not know any of her relatives or her friends. The father threatened the claimant when he wanted to end the relationship with Mauren, and the claimant was afraid that the father would use his past connection with the police to harm him. At that point the [sic] left the country. The claimant was asked a lot of questions about the issue of state protection. Even if I were to accept that Rafael Zamora worked for the police prior to 1994 and he might still have some connections with the police, the documentary evidence before me indicates that at the present time there are avenues of complaint against the police in Costa Rica. The claimant stated he did not make a formal complaint with the Ombudsman office because he was told that the process would take 3-4 years. He did not consider going to a lawyer because he was not sure what a lawyer could do for him. He was asked if he made any attempts to make formal complaints with the police per se and he stated that he did not because he was afraid the police would make fun of him.

. . .

It is incumbent upon the claimant to take all such steps as are reasonable to obtain protection in his country of nationality before seeking international protection. The claimant before me has not exhausted the avenues available to him to obtain state protection and has not provided a reasonable explanation for not doing so. There is no credible evidence before me that, if the claimant had taken the appropriate steps

not only by complaining to higher authorities, to the Courts, to Ombudsman's office, in respect to the incidents which he alleged caused him to have a fear of persecution, but also by following through on those complaints, the state would have been unable to protect him. Accordingly, the presumption that "persecution will be likely and the fear well-founded if there is an absence of state protection" is not satisfied in this case.

Issue

[11] Did the Board make an error with respect to the availability of state protection for the applicant?

Applicant's Submissions

[12] Credibility

The applicant submitted that the Board made no express negative credibility findings as to the applicant's testimony. In the absence of express negative credibility findings, the Board must be taken to have accepted the applicant's testimony as acceptable (see *M.B.K. v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 374).

[13] State Protection

The applicant submitted that the Board erred in relying on documentary evidence contrary to the applicant's testimony and as a result, dismissed the applicant's testimony on the basis that the documentary evidence came from "reliable, independent sources" (see *Coitinho et al v. Canada (Minister of Citizenship and Immigration)*, [2004] FC 1037).

[14] The applicant submitted that the Board did not have regard to the totality of the evidence when it stated that the applicant left the country because Mauren's father

threatened him. The Board failed to make any reference to the applicant's problems with the police and how Mauren's father was involved. The Board failed to properly consider that there was an actual beating of the applicant by the police and a number of visits of the police to the applicant's relatives' homes. The Board ignored relevant evidence about the applicant's fear of the police and Mauren's father's actual use of the police against him. Those points go directly to why the applicant was afraid to seek the protection of the authorities of his country.

[15] The applicant submitted that the Board erred in characterizing the applicant's testimony about his knowledge of Mauren and her family as vague. The applicant testified to what he knew, and while he had asked Mauren about what kind of business her father had been involved in, she did not tell him.

[16] The applicant submitted that the Board ignored the fact that while he did testify that he felt the police would make fun of him if he went to the police, he also stated that he was afraid of being arrested because the police had gone to his wife's, uncle's and grandmother's houses telling them that there were rape charges against him. The applicant further testified that he believed Mauren's father would use his connections against him.

[17] The applicant submitted that in light of *Canada (Attorney General) v. Ward* S.C.R. 689, the correct question for the Board to have considered was whether the applicant would have been placed at risk if he had gone to the police or complained against them, as the police were the agents of persecution.

[18] The applicant submitted that the documentary evidence before the Board showed that while one can lodge a complaint with the Ombudsman's office, the office has no enforcement mechanism or power and its suggestions are not binding on the government. Further, the documentary evidence showed that the Ombudsman's office itself noted that the police enjoy a high degree of impunity and that police self-investigations were tantamount to 'active impunity'.

[19] The applicant submitted that the Board failed to make any reference whatsoever in the reasons to the psychologist's report submitted into evidence. The report spoke directly to the applicant's fear of the police in Costa Rica and, and thus, his willingness to approach the authorities in Costa Rica for help. The Board's failure to make any reference to the report is a reviewable error (see *Javaid v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1730).

[20] The applicant submitted that the Board applied the wrong legal test in requiring the applicant to have exhausted all avenues of protection. The applicant need only make reasonable efforts to secure state protection (see *Gonzales Sanchez et al. v. Canada (Minister of Citizenship and Immigration)* 2004 FC 731 and *Peralta v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 989).

Respondent's Submissions

[21] The respondent submitted that the applicant failed to rebut the presumption of Costa Rica's ability to protect him. The applicant had failed to take any steps available to him to address his dissatisfaction with the alleged police response to his problems.

He did not take advantage of avenues open to him such as the Ombudsman's office or the court system. The Board's finding that the applicant's reasons for his failure to pursue the available options for state protection to not be persuasive was therefore not patently unreasonable.

[22] The respondent submitted that the Court in *Coitinho, supra*, found it patently unreasonable for the Board to rely on evidence of the union president and secretary general, leaders of the union, which the applicants in that case claimed threatened and persecuted them, to that of the applicant, without any reasonable explanation. This case is distinguishable in that the Board herein preferred and relied upon objective evidence from non-governmental organizations. The Board was entitled to prefer that documentary evidence to the applicant's (see *Zhou v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1087).

[23] The respondent submitted that the determinative issue in this case was state protection. The reasons show that the Board was fully aware of the applicant's fear of the police in Costa Rica. The applicant is asking the Court to reweigh the evidence weighed by the Board.

[24] The respondent submitted that it is reasonably open for the Board to expect persons to avail themselves of the redress afforded them from the Ombudsman's office in Costa Rica (see *Cascante v. Canada (Minister of Citizenship and Immigration)* 2004 FC 603).

[25] The applicant did not meet the onus upon him of showing that state protection would not be forthcoming to him if he had sought it. The submission that he would be risking his life if he did so is completely speculative.

[26] The respondent submitted that the psychologist's report reiterated the applicant's testimony with respect to the alleged events. The Board therefore did not commit a reviewable error even if it did not mention the report in the reasons (see *Gosal v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 346).

[27] The respondent submitted that the Board's statement that the applicant had not exhausted all the avenues available to him to obtain state protection, must be read in the context of the entire paragraph in the reasons. The Board was referring to whether it was reasonable for the applicant to take reasonable steps in the circumstances. The Board did not commit a reviewable error in that regard.

Relevant Statutory Provisions

Section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act, supra*, define "Convention refugee" and "person in need of protection" as follows:

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

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;

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.

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 a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

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 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 ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou

de santé adéquats.

(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.

(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.

Analysis and Decision

[28] **Standard of Review**

The prevailing view is that while the underlying factual findings are subject to the standard of patent unreasonableness, the Board's findings on the adequacy of state protection is a question of mixed fact and law that is reviewed on a standard of reasonableness *simpliciter* (see *Machedon v. Canada (Minister of Citizenship and Immigration)*, [2004] FCJ No. 1331 and *Chaves v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 232).

[29] The Board in this case did not find the applicant to not be credible. Accordingly, the evidence provided by the applicant was before the Board for its consideration.

[30] The Board, in its decision, stated the applicant feared his former girlfriend and her father who used to be associated with the police. However, a review of the evidence reveals that the applicant also left because the police beat him, causing him to be hospitalized and the police also stated they had an arrest warrant on a charge of rape. The allegedly false charge was instigated by the applicant's former girlfriend. The Board did not make any reference to these two factors in its analysis of state protection. In my view, the Board made a reviewable error by not referring to, and dealing with, these two factors in its analysis of the availability of state protection. It is up to the Board to weigh these additional facts, but it must deal with these facts.

[31] The Board also stated that if there was a conflict between the evidence of the applicant and the documentary evidence, the Board would prefer the documentary evidence because it came from reliable, independent sources which, unlike the applicant, have no interest in the outcome of the

proceedings. The Board gave more weight to the documentary evidence without finding the applicant to not be credible. If this process was allowed, then an applicant would always have their claimed denied when the documentary evidence conflicted with the testimony. There is no doubt that a board can prefer documentary evidence over the evidence of the applicant, but if it does so, it must give the reasons why it preferred the documentary evidence over that of the applicant. In my view, the Board made a reviewable error in this respect.

[32] Because of my finding on the above two issues, I need not deal with the other arguments raised in this case.

[33] The application for judicial review is allowed and the matter is referred to a newly constituted panel for redetermination.

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

ORDER

[35] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a newly constituted panel for redetermination.

“John A. O’Keefe”

J.F.C.

Halifax, Nova Scotia
August 24, 2005

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-7624-04

STYLE OF CAUSE: MAIKEL CHAVARRIA CHAVARRIA

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: August 4, 2005

REASONS FOR ORDER AND ORDER: O'KEEFE J.

DATED: August 24, 2005

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