Date: 20080221

Docket: IMM-5785-06

Citation: 2008 FC 235

Ottawa, Ontario, February 21, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

KEMEL MENA NARVAEZ; ILEANA AGLAE CASTILLO DE MENA; SAHAFADI EMIR MENA CASTILLO; DELFINA SALEH MENA CASTILLO; KEMEL ADALIO MENA CASTILLO

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Minister of Citizenship and Immigration (the "Applicant") seeks judicial review of the decision of the Immigration and Refugee Board, Refugee Protection Division (the "Board"), dated September 29, 2006. In its decision, the Board determined that Mr. Kemel Mena Narvaez, his wife Ileana Aglae Castillo de Mena and his children Sahafadi Emir Mena Castillo, Delfina Saleh Mena Castillo and Kemel Adalio Mena Castillo (the "Respondents") were persons in need of protection, although not Convention refugees, and accepted their claims.

[2] The Respondents are citizens of Mexico. The Principal Respondent was involved in the cattle business. In 1985, he entered into partnership with Mr. Diaz. According to his Personal Information Form ("PIF") narrative, the Principal Respondent began encountering problems with members of the Diaz family. The problems included an assault upon the Principal Respondent at his office. One of the employees of the Principal Respondent was assaulted at the same time. The incident was reported in a local newspaper.

[3] The Principal Respondent and his family suffered from other forms of harassment, including telephone calls to the Principal Respondent's wife. Threats were made against the safety of his daughter and one of his sons was the object of an attempted abduction. As well, demands for money were made by the Diaz family.

[4] The Principal Respondent attributed all these events to the Diaz family. He provided details in this regard in his PIF narrative and reviewed them again at the first day of the hearing of his claim. That hearing was held on April 29, 2005 and the matter was then adjourned, resuming on May 29, 2006.

[5] In the meantime, by Notice of Intent to Participate, dated January 9, 2000, the Applicant advised the Board that pursuant to subsection 170(e) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), he intended to participate in the hearing of the Respondents' claim and to present evidence, examine the Respondents and make representations.

[6] According to the Notice of Intent to Participate, the Applicant wanted to participate in the hearing because he had received information that the Principal Respondent was wanted in Mexico for charges of fraud relating to a cheque that had been issued on November 20, 2003 to one Angel Abel Rodriguez Novelo for the purchase of cattle. The cheque was rejected on December 5, 2003 because there were insufficient funds in the payor's account to cover it. The Applicant took the position in the Notice of Intent, that the Principal Respondent was inadmissible pursuant to section 1F(b) of the *United Nations Convention Relating to the Status of Refugees*, on the grounds that there were serious reasons to believe that he had committed a serious non-political crime.

[7] On March 5, 2004, Mr. Novelo presented a petition to file charges against the Principal Respondent. On August 16, 2004, the Public Prosecution Service charged the Principal Respondent with fraud. On August 26, 2004, a warrant was issued for the arrest of the Principal Respondent.

[8] When questioned on behalf of the Applicant about the outstanding charge at the resumption of the hearing, the Principal Respondent stated that he became aware of the outstanding charge and warrant in May 2004, upon being advised of same by his lawyer in Mexico. When asked to explain why he had not mentioned these matters at the earlier sitting before the Board, the Principal Respondent testified that he had no documents to substantiate the charge and the warrant and it did not occur to him to get a letter from his lawyer in Mexico.

[9] The Board found that the Respondents were credible and that the charge was "trumped up" and fraudulent. It concluded that they were persons in need of protection and that state protection

was not available because the agent of persecution was the “powerful” Diaz family. It further found that the Principal Respondent was not excluded by reason of committing a serious non-political crime because the charge was fabricated.

[10] The Applicant challenged the Board’s decision on the grounds that the Board failed to address the non-disclosure by the Principal Respondent of the existence of the outstanding charge and warrant. These matters were not mentioned in his Personal Information Form (“PIF”) nor in his testimony at the first hearing before the Board nor at any time before the Applicant gave notice of his intention to participate in the hearing of the claim for protection.

[11] The first matter to be addressed is the applicable standard of review, having regard to a pragmatic and functional analysis. Four factors are to be considered: the presence or absence of a privative clause; the expertise of the tribunal; the purpose of the legislation and the nature of the question.

[12] There is no privative clause in the Act. No full right of appeal is provided but judicial review is available, if leave is granted. Accordingly, the first factor is neutral.

[13] The Board is a specialized tribunal and this favours deference.

[14] The broad purpose of the Act is to regulate the admission of immigrants into Canada and to maintain the security of Canadian society. This involves consideration of many interests that may be

in conflict with each other. Decisions made in a polycentric context tend to attract judicial deference. The final factor is the nature of the question. Here, the decision turns on the Board's finding that the Principal Respondent gave credible evidence. Credibility findings are "quintessentially questions" of fact; see *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 38.

[15] Upon balancing the four factors involved in a pragmatic and functional analysis, I conclude that the applicable standard of review in this case is that of patent unreasonableness.

[16] The Applicant relies upon the decision in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 157 F.T.R. 35 in support of his argument that the Board committed a reviewable error by ignoring material evidence on a key issue that contradicts its findings.

[17] In this case, the Board determined that the fraud charge was "trumped-up" and fraudulent because it found the Principal Respondent to be credible. In my opinion, the Board erred in making this credibility finding because, in doing so, it apparently ignored the evidence of the existence of the outstanding charge, the outstanding warrant of arrest and the non-disclosure of this evidence by the Principal Respondent at the earliest possible time. This evidence, had it been considered by the Board, may have affected its credibility findings. As noted by the Court in *Cepeda-Gutierrez*, the more important the evidence that is ignored by the Board, the more likely the Court will infer that this decision was made without regard to the evidence.

[18] In the result, the application for judicial review is allowed. There is no question for certification arising.

JUDGMENT

The application for judicial review is allowed. There is no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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