Date: 20080505

Docket: IMM-3751-07

Citation: 2008 FC 571

Ottawa, Ontario, May 5, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

SARA LAURA TRIANA AGUIRRE,
JAVIER JOSHUE GONZALEZ TRIANA,
SABRINA LETICIA TRIANA AGUIRRE,
WILFRIDO ZUNIGA TRIANA and
DAVID SEBASTIAN ZUNIGA TRIANA

Applicants

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The principal applicant, Sara Laura Triana Aguirre, her son Javier Joshue Gonzalez Triana, her sister Sabrina Leticia Triana Aguirre and her sister's two sons, Wilfrido and David Sebastian Zuniga Triana (collectively referred to as the "applicants"), apply for judicial review, pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "IRPA"), of a

decision made by the Immigration and Refugee Board (the "Board"), dated August 14, 2007, which determined that the applicants were not convention refugees nor persons in need of protection.

[2] The principal applicant, Sara Laura Triana Aguirre, and the other family members are citizens of Mexico. Their account is as follows: the applicants lived together with the principal applicant's husband. The principal applicant had been physically abused by her husband beginning in 2003. On December 10, 2004, the principal applicant's sister found cocaine, cash, a gun and a list of names associated with a drug cartel in the husband's portfolio. The husband arrived to find her making this discovery and threatened her and her children if she told the principal applicant about what she found.

[3] On December 15, 2005, the husband assaulted and attempted to rape the principal applicant's sister. On December 16, 2005, the sister told the principal applicant about her experience and filed a formal complaint with the police the next day. Four days later the principal applicant, after consulting a lawyer, also made a formal complaint with the police about her husband's domestic violence.

[4] While the husband was away, the principal applicant changed the locks on the family home. The husband broke into the home and took away his jewellery, computer and other documents. On December 24, 2005 the principal applicant and the other family members fled to her mother's house. When they returned to retrieve valuables, they found that the family dog had been shot and a

warning written on the wall. Subsequently, the lawyer the principal applicant had consulted advised her that the complaints lodged against her husband had been dismissed for lack of evidence.

[5] On January 2, 2006, the husband telephoned the principal applicant at her mother's and threatened her. The principal applicant published a complaint in a local newspaper against the authorities for not providing her with protection. On January 7, 2006, the principal applicant's son, alone at his grandmother's, was confronted and pistol whipped by the husband who was his step father, not his natural father.

[6] The applicants fled to Juarez, Chihuahua. After an incident on January 11, 2006, where shots were fired at the vehicle the principal applicant was driving, the applicants flew to Mexico City to collect their passports. They arrived in Canada on January 13, 2006.

THE DECISION UNDER REVIEW

[7] The Board found that the applicants were not convention refugees or persons in need of protection because it found portions of their testimony to not be credible or trustworthy due to inconsistencies, omissions and speculations.

[8] The Board began by referring to the *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (the "Guidelines") and noting that some individuals in abusive relationships may have difficulties leaving their partners.

[9] The Board stated that questions of credibility arose because the applicants did not provide documents and their explanation for not providing those documents were not satisfactory. The Board was of the view that the delay in efforts to obtain documents was due to a lack of interest in pursuing their refugee claim.

[10] The Board considered omissions and discrepancies in the port-of-entry notes as a further basis for its negative credibility finding. The Board paid particular attention to the failure to mention taking refuge at the mother's residence or the assault on the son in the port-of-entry notes. The Board also found it significant that the principal applicant offered differing descriptions of the disposition of her complaint to the police in the port-of-entry-notes and her hearing. The Board remarked that the port-of-entry notes indicate that the file was lost, whereas at the hearing she stated that her complaint file was closed because of insufficient evidence.

[11] Finally, the Board considered as speculative the allegation that shots were fired at the principal applicant's vehicle at the instigation of her husband.

ISSUES

[12] The issues which arise in this application for judicial review are:

1. Did the Board err in basing its credibility assessment on the absence of corroborating documentation and in not considering the applicants' explanation for the absence?
2. Did the Board err in making a credibility finding by relying on omissions and discrepancies in the port-of-entry notes?

STANDARD OF REVIEW

[13] The Supreme Court of Canada held in *Dunsmuir v. New Brunswick*, 2008 SCC 9, that there are only two standards of review, correctness and reasonableness (*Dunsmuir* at para. 34). Questions of fact, discretion and policy generally attract a standard of reasonableness. The Supreme Court went on to note that board decisions relating to fact and credibility will continue to attract a high standard of deference.

[14] Questions of credibility are within the expertise of the Board (*Aguebor v. Canada (Minister of Citizenship and Immigration)* (1993), 160 N.R. 315 (F.C.A.)). As a result, issues related to reviewing credibility findings made by the Board attract the deferential standard of reasonableness (*Sukhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 427 at para. 15.

ANALYSIS

Did the Board err in basing its credibility assessment on the absence of corroborating documentation and in not considering the applicants' explanation for the absence?

[15] Applicants are presumed to be telling the truth in an IRB hearing (*Puentes v. Canada (Minister of Citizenship and Immigration*, 2007 FC 1335 at para. 16; *Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at paras. 6-8). Justice Teitelbaum in *Ahortor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 705 at para. 45, spoke to findings of credibility and findings of fact with respect to the absence of corroborating documentation:

> The Board appears to have erred in finding the Applicant not credible because he was not able to provide documentary evidence corroborating his claims. As in

> Attakora, supra, where the F.C.A. held that the applicant was not required to provide medical reports to substantiate his claim of injury, similarly here the Applicant is not expected to produce copies of an arresting report. This failure to offer documentation of the arrest, while a correct finding of fact, cannot be related to the applicant's credibility, in the absence of evidence to contradict the allegations.

[16] The Board's credibility analysis begins with the second paragraph in its reasons (Tribunal Record at 5):

> There were a number of credibility issues that arose. The claimants did not provide any of the following salient documents; the denunciations that were made to the authorities, the son's medical report as a result of the assault on him by the PC's spouse, and a copy of the public denunciation made in the local newspaper.

The Board's focus on the applicants' failure to provide documentation suggests that the absence of corroborating documentation is the Board's primary basis for a finding of a lack of credibility. To use the absence of documentation to impugn credibility is contrary to the proposition in *Ahortor*, above.

[17] In some instances, the failure to provide corroborating documentation may be a proper consideration for a board to undertake. Justice Kelen in *Amarapala v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 12 at para. 10, explained the circumstance where a the absence of corroborating documentation may impact credibility:

> …[w]here there are valid reasons to doubt a claimant's credibility, failure to provide corroborating documentation is a proper consideration for a panel if the Board does not accept the Applicant's explanation for failure to produce that evidence.

[18] The Board continues its credibility reasons by finding the explanations offered by the applicants for their delay and lack of success in securing documentation unsatisfactory, concluding

that the applicants demonstrated a lack of interest in pursuing their claim for refugee status, and it drew a negative inference as to their credibility:

> The PC and her son were asked what steps were taken to obtain documents from Mexico. They testified that no attempts were made until March 2007, approximately fifteen months after their arrival in Canada. They explained that they did not have any contact with anyone in Mexico and they did not have the intention of contacting anyone in Mexico. In March 2007, the PC made contact with a girlfriend who the PC felt would be of assistance in obtaining documents. The friend did not want to get the documentation because she did not want problems. The PC's son also made telephone contact with a friend, but was not able to obtain any documents. Further questions were asked as to why the lawyer could not be of assistance in obtaining the denunciation; the response was that she did not think it was necessary and that he had lost all credibility in her eyes; why the public denunciation which allegedly appeared in the newspaper was not available; the response was that she did not think of it; why there was no medical report for the son's injuries; the response was that she was fearful of the police and institutions. The explanations provided were not satisfactory. The claimants have demonstrated a lack of interest in pursuing their claim by waiting until March 2007 to even attempt to obtain available corroborative documentation and then not using various means that may have been available to them in order to obtain documents. The panel draws a negative inference as to their credibility. (Tribunal Record at 5-6)

While the Board does discuss the port-of-entry notes in relation to the applicants' credibility, the Board's discussion does not meet the "valid reasons" precondition set out by Justice Kelen in *Amarapala*, above.

[19] It is clear that the Board did not have much regard to the explanation provided by the applicants for the lack of corroborating documentation. The events that led to the applicants' flight from Mexico occurred within the space of a single month. They were fleeing a violent spouse who appeared to have an association with a drug cartel. The principal applicant was fleeing someone who had been violent toward her for the previous two years and whose violence was now extending

to other members of her family, namely her sister and her son. In doing so, they relocated twice before departing Mexico.

[20] This situation appears to have resulted in the principal applicant's self-alienation from her past in Mexico. The principal applicant explained:

> Because I did not have any contact with anyone, because when I left, when I was fleeing the country, I did not have any intention of ever dialling any phone number in Mexico, because the last thing that I wanted to do is call Mexico because I don't have any support from anyone in Mexico. And I didn't have any reason to call Mexico (Tribunal Record at 360).

[21] Coupled with this self-imposed alienation, the principal applicant was also alienated from her family. She testified that she did not have a close relationship with her brothers and would not be able to rely on them for assistance in obtain corroborating documentation (Tribunal Record at 365). The applicants explained in the PIF supplementary documentation that:

> [s]ince leaving Mexico, we have had no contact with our family. Our relationship has become quite distant due to the trouble that we had in Mexico. My brothers were not all supportive of our problems and we have not spoken to them since. We also did not want to put our family at further risk by telling where we were. We were so traumatized by our experience in Mexico that we felt it was best to cut off all relations with our family in Mexico.
>
> Recently we have discovered through a third party, that my mother has passed away. We have tried to contact our father to discover what happened, but we have not been able to reach him. We do not know if he changed his telephone number or moved, or what has happened. We have not contacted our brothers because we are sure they will blame us for what happened to our mother.

[22] The Board did not accept the applicants' explanation why they did not seek documentary corroboration until March 2007. While the Board is not bound to accept their explanation, it is

bound to consider that explanation instead of dismissing it as demonstrating a lack of interest in pursuing the refugee claim. This is especially so in the context of victims of domestic abuse in light of the Guidelines and country condition documentation before the Board.

[23] The Guidelines advise board members to be sensitive to issues arising from gender-related persecution as is asserted here by the applicants. Both the principal applicant and her son testified that the friends they contacted to obtain documents declined to get involved because of the trouble they could get into. Given that the Guidelines advise the Board to be sensitive to gender-related issues, it is surprising the Board does not consider the principal applicant's self-isolation, the alienation from family, or the disconnect from friends in relation to the non-support victims of domestic violence receive from both officialdom and Mexican society.

[24] The documentary evidence indicates that Mexican authorities do not adequately protect women against violence and abuse. At the legal end of the spectrum, Mexican state laws set a high threshold for prosecution of domestic violence against women. The Human Rights Watch Report, which was available to the Board, states (Tribunal Record p. 321):

> In several states, law and policy inadequately address the issue of violence against women, and existing protections fall short of Mexico's international obligation to adopt all necessary penal, civil, and administrative provisions to prevent, punish, and eradicate violence against women. In seven of Mexico's thirty-two independent jurisdictions, there is no specific law on the prevention and punishment of domestic violence. Seven states do not recognize domestic violence as a crime. Of the twenty-five states where domestic violence is penalized, fifteen state penal codes require women to suffer "repeated" violence in the family in order for it to be criminal. In eleven states, domestic violence is considered an infraction of the state civil code in addition to a criminal offense, though seven of these states require the violence to be repeated to merit sanctions.

[25] At the other end of the spectrum dealing with law enforcement, police are reported to have little regard for domestic violence complaints. As one woman in the same Human Rights Watch Report described:

> [O]ne time I had gone to declare against my ex-husband and I was all black and blue all beaten up and they said to me there wasn't enough proof. They took my declaration and did nothing" (Tribunal Record at 323).

[26] I find that the Board based its negative credibility finding on the absence of documentation and on rejection, without proper consideration, of the applicants' explanation for their delay and lack of success in obtaining documentation.

Did the Board err in making a credibility finding by relying on omissions and discrepancies in the port-of-entry notes?

[27] The Board considered it significant that the port-of-entry notes do not contain a report of the flight to the principal mother's home or the assault on the son as well as the principal applicant's differing explanation about the disposition of the police compliant.

[28] The port-of-entry notes for the principal applicant, her sister and her son are very brief, but are consistent with the applicants' PIF and testimony at the hearing. The principal applicant's translated explanation of her fear of returning to Mexico is only five sentences, as was her son's. The sister's explanation is an eight word sentence. (Tribunal Record at 165 and 204).

[29] As a result, this case can be distinguished from *Dehghani v. Canada (Minister of Employment and Immigration),* [1990] 3 F.C. 587 (F.C.A.) at para. 33, a case cited by the

respondent for the proposition that the existence of contradictions or inconsistencies between the evidence of an applicant and the port-of-entry notes is an accepted basis for a finding of a lack of credibility. In *Dehghani*, there was a fulsome transcript, consisting of 75 questions and answers, available on judicial review of the port of entry interview.

[30] The port-of-entry notes may be relevant if they differ markedly from an applicant's PIF or hearing testimony. They may also be relevant if the port-of-entry interview is extensive and contains significant differences from an applicant's later evidence. Here the brief port-of-entry notes are consistent with the applicants' later evidence. Given the brevity of the port-of-entry notes they are an insufficient basis for findings of significant omissions.

[31] Finally, the port-of-entry notes were prepared with the assistance of an interpreter as was the PIF statements and the hearing testimony. It is clear from reading the port-of-entry notes that they were not written by the principal applicant. The port-of-entry writer indicates that the police had 'lost' [sic] the complaint. The specific insertion of the quotation marks suggests something more than the ordinary dictionary meaning of the word lost since nothing else was in quotations (Tribunal Record at 165). The Board's reasons do not take this into account (Tribunal Record at 6). Against this backdrop whether the police file was 'lost' or closed because of lack of evidence is not a definitive difference upon which to find a lack of credibility.

CONCLUSION

[32] I find that the Board's findings on the credibility of the applicants to be unreasonable even given the deference due to the Board on findings of credibility. The application for judicial review is granted and the matter is to be returned for re-determination by a different Board.

[33] The applicant has submitted two questions on the use of port-of-entry notes for certification. The respondent opposes certification of the questions submitting, that use of port-of-entry notes are a matter of weight and would vary from case to case. I agree. I do not submit any question of general importance for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted.

2. The matter is to be sent back for re-determination by a different officer.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3751-07
STYLE OF CAUSE:	SARA LAURA TRIANA AGUIRRE ET AL. v. MCI
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 22, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	Mandamin, J.
DATED:	**May 5, 2008**

APPEARANCES:

Mr. Robert Blanshay	FOR APPLICANTS
Mr. Ned Djordjevic	FOR RESPONDENT

SOLICITORS OF RECORD:

Robert I. Blanshay Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
John H.Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT