Date: 20090417

Docket: IMM-3667-08

Citation: 2009 FC 388

Montréal, Quebec, April 17, 2009

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

JOSE SALVADOR HERNANDEZ VICTORIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review made pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) of a decision by the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated July 31, 2008, wherein the applicant was found not to be a *Convention refugee* nor a *person in need of protection* under sections 96 and 97 of the Act, on the basis of three main findings: his claim was not credible, the availability for him of adequate state protection in Mexico, and the availability of a viable internal flight alternative.

I. Facts

[2] The applicant, a Mexican-born citizen fled his home country and came to Canada on August 5, 2007, to claim refugee status against criminals who had kidnapped his boss on September 20, 2006.

[3] The applicant states that when the abductors were arrested, he was called upon to make an incriminating statement against these individuals. As a result, the applicant began receiving threats and alleges that he was even threatened at gunpoint.

[4] The legal proceedings against these criminals ended in December 2006, whereupon the claimant's boss left Mexico and returned to live in Spain while the applicant went to live with one of his relatives in Zacatecas where he stayed until July 4, 2007, when allegedly the kidnappers found him and threatened him again at gunpoint. Following this last incident, he obtained his passport on July 5, 2007 and left for Canada the following month.

II. Impugned Decision

[5] Before producing any evidence, the applicant's counsel requested that the Board member recuse himself. This request was based on negative statistics invoked by the applicant's counsel concerning his rate of success before this Board member in cases involving Mexican claimants. The Board member dismissed this request and stated that all his decisions took into consideration the

particulars of each case, and that the statistics invoked for his recusation did not give rise to a reasonable apprehension of bias on his part and did not constitute a sufficient and valid reason for the Board member to recuse himself.

[6] The case then proceeded and, in its decision, the Board found many inconsistencies and omissions in the applicant's evidence that negatively affected his credibility.

[7] The Board also found that the applicant's failure to seek state protection simply because he did not trust the Mexican authorities was insufficient to rebut the presumption of state protection in his home country and did not justify the applicant's claim for protection in Canada.

[8] Finally, the Board held that the applicant had a viable internal flight alternative.

III. Issues

[9] The issues submitted by the parties can be phrased as follows:

a. Did the Board member breach procedural fairness in not apprehending bias and by refusing to disqualify himself in light of the applicant's criticism of his prior decisions with regards to Mexican claims?

b. Did the Board commit a reviewable error with respect to its three main findings with regards to the claimant's credibility, the availability of state protection in Mexico, and the existence of an internal flight alternative?

IV. Analysis

Standard of review

[10] The present case involves questions of facts and weight of evidence intertwined with legal issues which attracts the standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9). As stated at paragraph 161 in *Dunsmuir*, "decisions on questions of fact always attract deference", especially when the credibility of the applicant is affected.

[11] This deferential standard recognizes that certain questions before administrative tribunals do not lend themselves to one specific, particular result but instead give rise to a number of possible and reasonable conclusions (*Dunsmuir*, at paragraph 47). Where the decision at issue falls within that spectrum, the Court should not interfere.

[12] On a question of law, however, such as one involving procedural fairness, the review should conform to a correctness standard.

State protection

[13] The Court must keep in mind that the Board is not required to establish the existence of state protection, since the onus to rebut the presumption of state protection remains at all times on the refugee claimant (*Canada (Attorney General) v. Ward*, [1993] 2. S.C.R. 689). It is now stated law that the standard of reasonableness applies to decisions concerning the availability of state protection (*Chaves* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 193; *Navarro* v. *Canada (Minister of Citizenship and Immigration)*, 2008 FC 358).

[14] The applicant's main fear, if he were to return to Mexico, is related to the threats of a few criminals who kidnapped his boss in 2006. But, as the Board mentions in its decision, absent a complete breakdown of government apparatus, "States are presumed to be able to protect their citizens". To counter this presumption of state protection, a claimant must provide clear and convincing evidence of the state's inability to protect.

[15] The applicant has chosen not to contest the Board's finding that Mexico is a functioning democracy with a judiciary and that he has not rebutted the presumption of state protection availability (*Espinosa v. Canada (Minister of Citizenship and Immigration*) 2005 FC 1393). This conclusion that state protection is available to the applicant constitutes sufficient grounds, in itself, to reject his refugee claim (*Sarfraz v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1974 (T.D.) (QL); *Kharrat v. Canada (Minister of Citizenship and Immigration*), 2005 FC 106).

[16] The fact that the criminals involved in the kidnapping of the applicant's boss were arrested and faced criminal charges shows that the judiciary functions and that state protection against criminals exists in Mexico.

[17] However, the applicant never sought protection from the Mexican authorities. To explain his failure to seek protection, he simply states that he does not trust the authorities, and relies on reports stating that police corruption is rampant in Mexico. However, the Court finds it rather odd that the applicant accepted to testify as an eyewitness and ultimately assisted the police with their investigation, while apparently lacking complete confidence in the entire Mexican system.

[18] But one thing is sure. The end result of the applicant's attitude is that one will never know if the protection available for him in his home country was reasonably inadequate or not. This strategy can be of no assistance to the applicant, since it is stated law, even if he had no trust in the local protection offered by the police, that the applicant was required to at least request protection from his government.

[19] Consequently, it was not unreasonable for the Board in its decision to conclude that state protection was available in Mexico to protect the applicant from the criminals against whom he testified, and that the applicant had not rebutted the presumption that Mexico is able to provide him adequate protection.

[20] This conclusion in itself provides sufficient grounds for the Court to reject the applicant's recourse against the impugned decision.

Internal flight alternative

[21] The Board dismissed the applicant's asylum claim for the further reason that it found that the applicant had an internal flight alternative (IFA) available to him The applicant here chose not to seriously challenge this conclusion.

[22] "It is well-established that the existence of a valid IFA is determinative of a refugee claim. Once an IFA is found, the Court need not consider the other issues raised by an applicant on judicial review" (*Shehzad Khokhar v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 449, at para. 42; *Shimokawa v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 445 at para. 17; *Sran v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 145 at para. 11). This finding constitutes reason enough to dismiss this application for judicial review.

Credibility issue

[23] Although the Board could have rejected the applicant's claim on the sole basis of the availability for him of state protection and/or of an IFA, the Board also found that the applicant had not even provided credible and consistent evidence in support of his claim.

[24] The Board has a well-established expertise in determining questions of facts, particularly in the evaluation of the applicant's credibility and subjective fear of persecution. The Court will

usually not intervene with the findings of fact reached by a Board unless they are found to be unreasonable, capricious or unsupported by the evidence (*Aguebor v. Canada (Minister of Employment and Immigration*) (F.C.A.), [1993] F.C.J. No. 732; *Navarro*, above at paragraph 18).

[25] The RPD findings in this case with regard to the applicant's lack of credibility are relevant and well supported by the evidence. These findings are not capricious, are sufficiently serious and well stated, and are relevant and supported by the evidence. Therefore, they are not unreasonable.

[26] Having heard the applicant and analysed the evidence, the Board was in a much better position than this Court is to assess the claimant's credibility and to conclude as the Board did on this issue. The Court finds that it was reasonable for the Board to conclude as it did.

Allegations of Bias

[27] At the very beginning of the hearing before the Board, the applicant's counsel accused the Board of being biased towards Mexican applicants and, consequently, asked him to disqualify himself. In support of this request, the applicant's counsel invoked negative decisions rendered by the Board member in other cases involving Mexican applicants, and claimed in particular that in those cases the Board had ignored important evidence. The Board member dismissed this request judging the reasons submitted for his recusation insufficient and ill-founded as all his decisions depended on the particular facts of each case. Therefore, he saw no valid reason to recuse himself in the present matter. In his arguments before this Court, the applicant pleads that the aggressive

attitude of the Board member, as demonstrated by the transcript of the hearing, proves in retrospect that the apprehension of bias alleged against the Board member at the beginning of the hearing to obtain his recusation was in fact well founded.

[28] The Board is entitled to rely on a claimant's demeanour to assess his credibility. In the case at bar, and at the very beginning of the hearing, the Board found it unusual that that applicant smiled while answering a serious question, and he therefore asked him why he was smiling. The question was a perfectly normal one for the Board member to ask. It was this question that led the applicant's counsel to request the Board member to recuse himself. But the applicant seems to forget here that the Board is entitled to rely on a claimant's demeanour to assess his credibility, and that if the Board found it unusual that he smiled while answering a serious question, it was reasonably permissible to ask him why he was smiling.

[29] Furthermore, the Board is owed considerable latitude in the manner in which it conducts a hearing, including the right to extensively and energetically question a claimant. Extensive and energetic questioning alone will not, in itself, give rise to a reasonable apprehension of bias (*Osorio v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1459. (*Banklow v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1581, at para. 23).

[30] With respect to the manner of questioning during the hearing, the Court, having reviewed the transcript, finds that the questioning by the Board came nowhere near satisfying the test for a reasonable apprehension of bias. That test, paraphrased from the widely accepted views expressed

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.

[31] The Court disagrees with the applicant that the method and way of questioning in this particular affair should be considered cumulatively with the errors and/or bias attributed to the Board member in other affairs involving Mexican applicants. The merit of the decisions rendered by the Board member in other cases was and remains irrelevant. If it were so simple to establish bias, allegations of bias would become quite popular in applications for judicial review before this Court.

[32] "An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. It is often useful, and even necessary, in doing so, to resort to evidence extrinsic to the case. That is why such evidence is admissible in derogation of the principle that an application for judicial review must bear on the matter as it came before the court or tribunal" (*Arthur v. Canada (Attorney General)*, 2001 FCA 223, at para.8). It cannot also rest on the statistics of the number of cases won by a counsel before a particular decider, since every case has its own particularities and the facts are never the same and depend, especially in this type of case, on the situation of each individual claimant.

[33] The gratuitous allegation made here by the applicant's counsel and related to decisions rendered by the Board member in other cases where the applicant's counsel acted has no merit whatsoever : firstly, nothing proves that the alleged negative decisions of the Board member in other cases involving Mexican applicants were ill-founded or resulted from a bias of the Board member; secondly, the Court should not concern itself with such wild allegations and should limit itself to verify here if the impugned decision contains any reviewable error or if the file shows any bias on the part of the Board member towards the present applicant, thus justifying its intervention.

[34] The applicant has been unable to demonstrate in the present matter in what way or why the Board member was not impartial or which statements made by him show any bias on his part. As a consequence, the applicant fails on this issue.

V. Conclusion

[35] Having reviewed the evidence, the Court concludes that the applicant has failed to show that the impugned decision is unreasonable because not being within the range of acceptable outcomes defensible in fact and in law. Therefore, this application for judicial review will be dismissed.

[36] The Court agrees with the parties that there is no question of general interest to certify.

JUDGMENT

FOR THE FOREGOING REASONS, THIS COURT dismisses the application.

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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