Federal Court  Cour fédérale

Date: 20100303

Docket: IMM-2896-09

Citation: 2010 FC 246

Ottawa, Ontario, March 03, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JOSE HENRY MONGE CONTRERAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Immigration Division of the Immigration and Refugee Board, dated April 28, 2009, finding that the applicant was inadmissible to Canada pursuant to paragraphs 34(1)(f) for 34(1)(b) of the IRPA and consequently issuing a deportation order against the applicant. These are my reasons for dismissing the application.

Background

[2] Mr. Monge Contreras, the applicant, was born in El Salvador on March 19, 1971.

[3] The applicant's family was forced to relocate from the village of Cinqueras to San Salvador due to the actions of state security forces in 1979-1980. In San Salvador, the applicant's father became involved with the Farabundo Marti Para La Liberacion Nacional (FMLN), making his house available for the covert storage of FMLN weapons and munitions (pistols, rifles and detonators).

[4] The FMLN is an organization that attempted the subversion by force of the Government of El Salvador in the 1980s. After peace accords were signed in 1992, all armed FMLN units were demobilized and their organization became a legal political party. The FMLN is now one of the two major political parties in El Salvador.

[5] It was the applicant's father's decision to hide weapons for the FMLN in the family home. At that time this involvement began, the applicant was 14 years old. Upon request of his father, in approximately 1985-1986, on two occasions the applicant passed a bag of weapons to persons he assumed were members of the Urban Commandos of the FMLN. At that time, the applicant was aware that the FMLN destroyed bridges, hydro posts, was involved in kidnappings and killed government officials.

[6] In 1992, the applicant obtained a membership card in the FMLN when the organization became a legitimate political party and worked in their election campaign.

[7] The applicant arrived at the Fort Erie Canadian border on August 9, 2005 and claimed refugee protection. When interviewed by the immigration authorities, the applicant stated that he was a member of the "Urbanos Commandos" and the FMLN. The applicant indicated that he was responsible for hiding weapons and bomb materials for the Urbanos Commandos, and that those weapons and bomb materials were used to blow up government facilities, bridges, power lines, and in other offensive attacks.

[8] At his August 11, 2005 interview by the CBSA, the applicant indicated that he had voluntarily collaborated with the Urbanos Commandos from 1985 to 1989, and that he became a member as a result of the problems his family faced at the hands of the Armed Forces. The applicant indicated that he became a member through his father, and that it was his duty and his father's to keep the Urbanos Commandos' guns, detonators, and bomb-making materials in their house.

[9] In his PIF narrative, the applicant stated that he was a member of the Urbanos Commandos from 1985 to 1989.

[10] On May 26, 2007, the applicant was interviewed for the purposes of determining whether or not he was reportable under sections 34 and 35 of the IRPA for his membership and/or affiliation

with the Urbanos Commandos and the FMLN. The immigration officer then proceeded to write inadmissibility reports pursuant to subsection 44(1) of the IRPA.

[11] The Minister of Public Safety alleges that Mr. Monge Contreras is a foreign national who is inadmissible on security grounds and also on grounds of violating human or international rights for his membership in, and his complicity in the acts of, the FMLN, contrary to paragraphs 34(1)(f) and 35(1)(a) of the IRPA.

Decision Under Review

[12] In a decision supported by extensive reasons, the panel member found that it had been established, on reasonable grounds, that the applicant is a member of the FMLN, an organization that is believed, on reasonable grounds, to have engaged in, or instigated, the subversion by force of the Government of El Salvador.

[13] As the applicant had not discharged the burden of proof on him to establish that the facts constituting inadmissibility did not exist, Mr. Monge Contreras was found inadmissible to Canada pursuant to paragraph 34(1)(f) for 34(1)(b) of the IRPA.

[14] Relying on Justice Snider's decision in *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1457, [2006] F.C.J. No. 1826, the panel analysed the two main elements of

an allegation at paragraph 34(1)(f) of the IRPA, namely membership in the organization, and the involvement of the organization in acts of espionage, subversion or terrorism.

[15] When before the Immigration Division, the applicant had attempted to distance himself from the organization by stating that he was neither a member nor a collaborator of the FMLN. The panel found that the applicant's attempt to extricate himself from the statements he made merely raises issue about his credibility, and the retraction of pertinent information and the recantation of key evidence are logically viewed with some scepticism.

[16] Relying on *Diaz v. Canada (Minister of Citizenship and Immigration)*, (1997), 135 F.T.R. 235, [1997] F.C.J. No. 1102, the panel was persuaded that the applicant's original statements to CBSA in 2005 are credible and should be given more weight than his subsequent modification, resorted to when he gained a good understanding of the risk of inadmissibility he faced under paragraph 34(1)(f) of the IRPA.

[17] The panel considered that the applicant joined the FMLN, as a son carrying out the instructions of his father, when he was about 14 years of age. By 1989, when his affiliation is alleged to have ceased, he would have been about 18 years of age. In 1992, when he received the membership card of the FMLN and worked for that organization for about three months, he would have been about 22 years of age.

[18] In considering the culpability or responsibility of minors as in *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] F.C.J. No. 381, the panel found that the

applicant's maturation makes it difficult to sustain the argument that he was a minor who did not have the requisite knowledge or mental capacity to decipher for himself the kind of organization that the FMLN was and its *modus operandi*. The panel also noted that there is no evidence before it to suggest that the applicant was ever coerced into doing things for the organization by his father.

[19] The panel also found compelling evidence in the Minister's Disclosure that showed the membership of Mr. Monge Contreras in the organization in the years 1985 to 1992 which coincides with the time period that the organization was involved in acts of subversion.

[20] Again by relying on Justice Snider's decision in *Al Yamani*, above, at paras. 11-14, the panel found that it was abundantly clear that a temporal connection was not required for the establishment of an allegation under paragraph 34(1)(f).

[21] The panel concluded that the FMLN is an organization that falls within the purview of paragraph 34(1)(b) of the IRPA as it engages, has engaged, or will engage, in subversive activities and that the applicant, by lending a modicum of support to the FMLN, has assisted in some way the furtherance of the FMLN's subversive agenda.

Issues

[22] The sole issue is whether the panel's decision was reasonable when it found that the applicant was inadmissible to Canada pursuant to paragraph 34(1)(f) for 34(1)(b) of the IRPA.

Analysis

[23] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, the Supreme Court of Canada abandoned the patent unreasonableness standard leaving only two standards of review, correctness and reasonableness. The Supreme Court also held that a standard of review analysis need not be conducted in every instance. Where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review.

[24] As recently explained by Deputy Judge Frenette in *Motehaver v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 141, [2009] F.C.J. No. 190, at para. 11:

> …the issue of whether an applicant is a member of an organization referred to in paragraph 34(1)(f) is reviewed on a standard of reasonableness, as it is a question of fact and law (*Poshteh v. Canada (M.C.I.)*, [2005] 3 F.C.R. 487 (F.C.A.); *Afridi v. Minister of Public Safety and Emergency Preparedness et al*., 2008 FC 1192; *Faridi v. Minister of Citizenship and Immigration*, 2008 FC 761).

[25] Accordingly, the standard of review to be applied in this case is reasonableness.

[26] In my view, the panel conducted a thorough review of the evidence before it. As the applicant has not discharged the burden of proof on him to establish that the facts constituting inadmissibility did not exist, I am satisfied that the panel's conclusion that Mr. Monge Contreras is

inadmissible to Canada pursuant to paragraph 34(1)(f) for 34(1)(b) of the IRPA is legally unassailable.

[27] Taking into consideration that Mr. Contreras was nervous during his initial interviews and considered the actions of the CBSA officers intimidating, the panel's finding that the applicant's attempt to distance himself from his port-of-entry admissions was not credible is reasonable. The panel simply did not believe the applicant's later story on the extent of his father's influence, over that which he had advanced from the time of his initial interviews in 2005 and 2006 through to the time just before his admissibility hearing: *Zazai v. Canada (M.C.I.)*, 2004 FC 1356, [2004] F.C.J. No. 1649, at para. 22; affirmed by the Federal Court of Appeal in: 2005 FCA 303, [2005] F.C.J. No. 1567.

[28] The member considered that the applicant's involvement began when he was a minor, and, as such, that he was acting under the direction and control of his father. As in *Poshteh*, above, this issue was reasonably evaluated. The panel found that the applicant's maturation over the years of activity with the FMLN made it difficult to sustain the argument that the applicant was a minor who did not have the requisite knowledge or mental capacity to decipher for himself the kind of organization that the FMLN was and its *modus operandi*.

[29] Even if I were to accept that the nature of the FMLN changed over the years at issue and that it became a separate and distinct body, the evidence indicates that the applicant was involved with the FMLN from 14 years of age until he was approximately 22 years of age by which time the

FMLN had become a legitimate political party. He can't sever that earlier involvement from the point at which he formally joined the evolved organization.

[30] While the applicant did not join or support the FMLN of his own free will when he was 14 years of age, the fact that he remained involved with the organization until he was 22 years of age, is indicative of a degree of adult participation.

[31] As stated by Justice Snider in *Al Yamani*, above, at para. 11, there is no temporal component to the analysis in paragraph 34(1) (f). If there are reasonable grounds to believe that an organization engages today in acts of terrorism, engaged in acts of terrorism in the past or will engage in acts of terrorism in the future, the organization meets the test set out in s. 34(1)(f).

[32] Membership, in the context of paragraph 34(1)(f) of the IRPA, is to be given a broad and unrestricted interpretation, since in immigration legislation, public safety and internal security are highly important: *Motehaver*, above, at para. 29.

[33] I note that the applicant was aware, through the media in El Salvador at the time of his involvement with the FMLN, that the organization for which he hid weapons and bomb material in the family home used such material to blow up government facilities, bridges, power lines, and in other offensive attacks.

[34] The panel gave clear and intelligible reasons supporting its decision, drawing inferences from the facts provided by the applicant himself in his PIF, his interviews and his testimony: *Motehaver*, above, at para. 28. Moreover, the panel had the benefit of hearing the applicant's evidence directly.

[35] Accordingly, I find that the Immigration Division did not make unreasonable findings in concluding that Mr. Monge Contreras is inadmissible under paragraph 34(1)(f) for 34(1)(b) of the IRPA. I agree with the panel that the applicant has not discharged the burden of proof on him to establish that the facts constituting inadmissibility do not exist.

[36] The decision of the panel falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir*, above, at para. 47.

[37] Having found that the decision of the panel was a reasonable result in this case, it is not open to this Court to substitute its own view of a preferable outcome: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, para. 59.

[38] The parties were given an opportunity to propose questions for certification. As set out in paragraph 74(d) of the IRPA and Rule 18(1) of the *Federal Courts Immigration and Refugee Protection Rules* / SOR 93-22, as amended, there can be no appeal of this decision if the Court does not certify a question.

[39] Relying on the Federal Court of Appeal's decision in *Poshteh*, above, the applicant proposed that the Court certify a question whether, in addition to the applicant's minor age at the time of the alleged membership in an organization defined under subsection 34(1) of the IRPA, it is relevant to consider the social context of that membership including the degree of parental influence and control within the society in question.

[40] The respondent is opposed to the certification of such a question.

[41] In *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368, the threshold for certification was articulated by the Federal Court of Appeal as: "is there a serious question of general importance which would be dispositive of an appeal" (paragraph 11).

[42] In *Kunkel v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 347, [2009] F.C.J. No. 170, at para. 8, citing its 2006 decision in *Boni v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68, [2006] F.C.J. No. 275, at para.10, the Federal Court of Appeal determined that a certified question must lend itself to a generic approach leading to an answer of general application. That is, the question must transcend the particular context in which it arose.

[43] In *Boni, supra*, the Federal Court of Appeal stated that "it would not be appropriate for the Court to answer the certified question because the answer would not do anything for the outcome of the case (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, [1994] F.C.J. No. 1637, (1994) 176 N.R. 4)."

[44] In my view, it would not be appropriate to certify the question proposed by the applicant as it would not be dispositive of this case. The panel took into consideration the applicant's age and the fact that he was subject to his father's control when his involvement began, in arriving at its decision.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed. No question is certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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