Federal Court		Cour fédérale

Date: 20100913

Docket: IMM-5581-09

Citation: 2010 FC 907

Ottawa, Ontario, September 13, 2010

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

FRANCISCO JAVIER GARCIA OSORIO
SANDRA MARGARITA FORERO SAMPER
NICHOLAS GARCIA
DANIEL GARCIA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is a judicial review of a decision of the Immigration and Refugee Board (Board) where it held that the Applicants were neither Convention refugees nor persons in need of protection. The principal Applicant (the Applicant) and his wife are citizens of Colombia whereas the two children are citizens of the United States.

[2] The Applicants sought protection based on their fear of the Revolutionary Armed Forces of Colombia (FARC), a guerrilla movement which was and is continually operating in Colombia. The Applicant came to the attention of FARC because of his work distributing educational materials to local schools. FARC wanted the Applicant to disseminate their propaganda for them using the cover of educational distribution. The Applicant claimed that his life would be at risk if he did not comply with FARC's demands.

[3] The Board found that the Applicant was credible, but concluded that there was no serious possibility he would face persecution by FARC upon return to Colombia.

II. BACKGROUND

[4] In January 1999, while working as a salesman of educational materials, the Applicant was approached by FARC. Because the Applicant had access to schools, FARC considered him a perfect cover and distributor of their own propaganda. When he was first approached, the Applicant was afraid to directly refuse to act on behalf of FARC so he did not say that he would not do as demanded.

[5] In March 1998 FARC informed the Applicant's wife that the propaganda materials were ready for distribution. Rather than begin distribution, the Applicants moved to a different city.

[6] However, a month later FARC caught up with the Applicant in the new city. In May, he was advised that a meeting would be set up in June to begin the distribution of materials. The Applicant did not attend the June meeting.

[7] In July of that year, the Applicant and his wife were stopped on the roadside, a gun was put to the Applicant, and he was advised that this was his last opportunity to assist FARC; otherwise, he would be killed.

[8] As a result of that encounter, the Applicant and his wife left for the United States in August 1998 and subsequently lived there for 11 years. They attempted to obtain asylum in the United States but that application was denied. They subsequently moved to Canada where they made their refugee claim.

[9] The remainder of the Applicant's family (parents and siblings) remained in Colombia. He claimed that they were subjected to threats and inquiries as to his location, and that as a result, his parents moved on a number of occasions over that 11-year period.

[10] As part of the evidentiary record, the Applicant had submitted a letter from his mother confirming the threats, and the fact that unknown persons were inquiring about his whereabouts and when he would be returning. The letter goes on to confirm that as a result of those encounters, the mother and father had moved numerous times.

[11] As indicated earlier, the Board found the Applicant to be credible and his evidence trustworthy. The Board accepted his subjective fears but held that those fears were not supported by objective evidence. The critical objective evidence relied on by the Board was the fact that 11 years had passed since the Applicant had left and that conditions in Colombia had changed significantly such that the threat posed by FARC had been very much reduced. The Board concluded that the Applicant was not a target or a member of a social group which was targeted by FARC; the targeted groups being politicians and the wealthy.

III. ANALYSIS

[12] The standard of review on findings of fact in this case is the standard of reasonableness with considerable deference owed to the Board.

[13] The thrust of the Applicant's case is that he was targeted by FARC, that his life was threatened and that FARC will again engage in threats and pressure if for no other reason than to exact retribution for his refusal to comply with their demands. This prospective view of the threat was supported by his mother's letter and thereby formed a critical part of his case.

[14] In its decision, the Board identifies that treatment of family was an important aspect of the case. The Board specifically refers to the fact that the family of the Applicant's wife had not been subjected to any form of adverse treatment or threats. However, the Board makes no mention of the experiences of the Applicant's family.

If it was relevant for the Board to consider the circumstances of the family of the Applicant's wife, it was clearly relevant to consider the circumstances of the Applicant's family. This the Board failed to do.

[15] In respect of the mother's letter, there is no question that the letter is somewhat vague and lacking in precise detail. However, it is documentary evidence relied upon by the Applicant which addresses the potential threat he faces upon return to Colombia.

[16] If that letter is accurate, arguably FARC is still looking for the Applicant and his fears of retribution have some reasonable basis. The mother's letter is therefore an important piece of evidence in this case, yet there is simply no mention of that letter in the Board's analysis of the circumstances that the Applicant would face upon return.

[17] The Federal Court in numerous decisions has accepted the rationale in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration),* [1998] F.C.J. No. 1425, and most particularly, the following paragraphs:

> **15** The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency. Just as a court will only defer to an agency's interpretation of its constituent statute if it provides reasons for its conclusion, so a court will be reluctant to defer to an agency's factual determinations in the absence of express findings, and an analysis of the evidence that shows how the agency reached its result.

> **16** On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (*Medina v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.
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> **17** However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.
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> (Emphasis added)

[18] In this case the mother’s letter was highly relevant as it reflected the potential threat to the Applicant. The letter contradicts the Board’s conclusions, yet the Board is silent on any evidence which points to an opposite conclusion to that which it reached. It is proper for this Court to infer that the letter was either overlooked or alternatively, if it was considered, that no rationale was given for dismissing the letter or giving it less weight than the other documentary evidence.

[19] Under these circumstances, the Court must conclude that the Board failed to meet the standard of reasonableness in reaching its decision as it failed to either consider or to adequately explain the significance, or lack thereof, of the Applicant's evidence.

IV. CONCLUSION

[20] Therefore, this judicial review will be granted, the decision of the Board will be quashed and the matter will be referred back to the Board for a new determination before a separately constituted panel. There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is granted, the decision of the Board is quashed and the matter is to be referred back to the Board for a new determination before a separately constituted panel.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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