Federal Court  Cour fédérale

Date: 20101112

Docket: IMM-806-10

Citation: 2010 FC 1138

Toronto, Ontario, November 12, 2010

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

SANDRA MILENA DIAZ PINZON
JHON EDGAR NAVAS OJEDA
ANDRES FELIPE NAVAS DIAZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application concerns members of a family who are citizens of Columbia and who claim refugee protection under s. 96 and s. 97 of the *IRPA* from the para-military group the FARC in Columbia. In its decision, the Refugee Protection Division (RPD) rejected the Applicants' claim on a primary finding of negative credibility. For the reasons which follow I find that the RPD's decision was rendered in manifest error.

[2] In its decision the RPD states the evidence provided by the Applicants as follows:

> [3] The principal claimant is a 32-year-old woman originally from Bogota, where she and her family lived when their problems with the Revolutionary Armed Forces of Colombia (FARC, guerrillas) occurred. She worked for a company whose business was organizing concerts. She said that she was on a company trip to Valledupar on April 27, 2007, when she found a note under her hotel room saying "death to you if you do not cooperate." She said she showed this to her colleague, Mauricio, and thinking it was a bad joke, she destroyed the note.
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> [4] After returning to Bogota, she said that she received a phone call from a man who said that he was a commandant of the Bolivarian militias Front 59 of the FARC. He demanded that she give him a list of information on the firm's best 100 clients within two weeks or they would kill her and her family. On May 1, 2007, she said that she received a call reminding her of the FARC's demand. On May 2, 2007, she said that she received a call from another FARC man demanding 10 million pesos within 48 hours and not to inform authorities. Several calls followed the two demands. She and her husband decided to pay the money demanded to buy time, so they could arrange for visas with the U.S. Embassy. They raised 6 million pesos from the sale of their car, 2 million from her sister, Patricia, and they borrowed 2 million from the company she worked for. On May 4, she delivered the money as instructed. On May 7, she got a call asking for the client information list, but managed to negotiate for more time, which was reset for June 1. On May 8, they received their U.S. visas. They moved to her sister-in-law's house where they hid until they left the country on June 13, 2007. Before leaving, they filed reports with the U.N. Human Rights Office and the Attorney General's Office.

[3] The RPD's negative credibility finding is composed of a number of implausibility findings as follows:

> [8] The determinative issue in this case is credibility as to the well-foundedness of the claimants' fear. The panel finds the principal claimant's story not to be wholly credible in its material aspects due to the following reasons.
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> [9] The principal claimant had said that on April 30, 2007, the FARC demanded that she supply them with an information list of the company's top 100 clients. She said that she had managed to put this

off until they eventually left the country on June 13, 2007. As far as she knew, no one else in the company was approached by the FARC for this list. She knew that her boss had access to the list as well but was not approached by the FARC. The panel finds it hard to believe that the FARC would not have approached the boss as an alternate source of the list they wanted. From this, the panel does not believe, on a balance of probabilities, that the principal claimant was or is a target of the FARC.

[10] The principal claimant's mother and sister still live in Bogota to this day without having been personally confronted by the FARC looking for her. It is well known that the FARC also targets close family members of people they have targeted. The fact that the FARC had not gone after her mother and sister in Bogota, even if they may have moved to another dwelling, casts serious doubt on the principal claimant's assertion that the FARC was after her. The panel draws a serious negative inference from this regarding her assertion that she was a target of the FARC and consequently does not believe, on a balance of probabilities, that she was or is a target of the FARC.

[11] The principal claimant said that she was warned by the FARC not to tell anyone about their demand of 10 mission pesos. The panel finds this perplexing because the FARC already were outlaws, and, therefore, it would make no difference if someone had made a complaint about them to police. Whether any further complaint was made against them or not, they were already wanted by the police. The panel, therefore, draws a negative inference from this embellishment to her claim.

[12] Furthermore, she said that the FARC provided her with elaborate instructions on how she was to deliver to them the 10 million pesos extortion money at a shopping mall in Bogota. Again, the panel finds this perplexing in that the FARC could simply have gone to her house to pick up the money and accomplish the operation in a simpler and straightforward manner, since they had already warned her about going to the authorities. The panel, therefore, also draws a negative inference from this, which the panel considers to be, on a balance of probabilities, an embellishment to her claim.

[13] The principal claimant had said that she had destroyed the FARC's demand note, which she received at the hotel on April 27, 2007. Although, oral testimony is given a lot of weight over documentary evidence, the note would have been central to providing support to her claim, as it represented the start of her problems with the FARC. Consequently, the panel draws a negative

> inference regarding the absence of this note and believes, on a balance of probabilities, that she never received such a note.
>
> [14] The principal claimant had also said that, just before leaving the country, she had filed a report with the local human rights office, the Attorney General's office and the Ombudsman's office as to her problems. However, considering the foregoing discussion and the timing of filing such reports, the panel finds the veracity of such documents suspect even if they have been included in evidence. The panel believes that, on a balance of probabilities, these documents in evidence were acquired as convenience documents for the purpose of furthering their refugee claims and were not really intended to achieve a serious investigation against the FARC.
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> [15] On the basis of the foregoing, the panel does not believe, on a balance of probabilities, that the claimants are targets of the FARC.

[4] With respect to why the RPD's credibility finding is made in reviewable error, Counsel for the Applicant relies on the well known decision in *Valtchev v. Canada (The Minister of Citizenship and Immigration)*, 2001 FCT 776 to make the following concise argument at paragraph 22 of the Applicants' Memorandum of Argument followed by a very detailed analysis substantiating the argument (see paras. 23 to 28):

> In assessing the Applicants' credibility/plausibility, it is submitted that Member Lim misconstrued the Applicants' evidence, ignored country condition documentation and dismissed corroborating evidence as convenience documents acquired for the purpose of furthering their refugee claims. It is submitted that Member Lim essentially "created" country conditions by imposing his own subjective and unsupported view of FARC's methods and operations and drew serious negative inferences by assessing the Applicant's [sic] testimony against his erroneous and unsupported depiction of those methods and operations.

I completely agree with this argument.

[5] It appears that the RPD needs to be reminded of the well established law on credibility, and, in particular, the law on making implausibility findings. My reasons in the decision of *Istvan Vodics v. Minister of Citizenship and Immigration*, 2005 FC 783 accomplish this objective at paragraphs 8 to 13:

> Credibility is at issue in every refugee claim. Even though credibility findings are "the heartland of the [CRDD's] jurisdiction" (*R.K.L. v. Canada (M.C.I.)*, 2003 F.C.J. 162), and, as a result, attract the deferential standard of review of patent unreasonableness (*Aguebor v. Canada (M.E.I.)*, [1993] F.C.J. 1992), they must be made according to law. In addition, as outlined in Section D below, the decision is also made in reviewable error because the CRDD failed to decide whether the test for prospective fear of persecution was met.
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> In my opinion, the CRDD failed to apply the existing law in four ways: failure to adhere to the principle that sworn testimony is presumed to be truthful, and a finding to the contrary must be made for specific reasons; failure to give clear reasons in making a negative credibility finding; failure to provide due process by providing a proper opportunity to refute specialized knowledge of the decision-maker before such knowledge is used in reaching a decision; and the use of unfair stereotypes in the decision-making process.
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> 1. *The application of the presumption of truthfulness*
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> With respect to making negative credibility findings in general, and implausibility findings in particular, Justice Muldoon in *Valtchev v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1131, states the standard to be followed:
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> > 6. The tribunal adverts to the principle from *Maldonado v. M.E.I.*, [1980] 2 F.C 302 (C.A.) at 305, that <u>when a refugee claimant swears to the truth of certain allegations, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness</u>. But the tribunal does not apply the *Maldonado* principle to this applicant, and repeatedly disregards his testimony, holding that much of it appears to it to be implausible. Additionally, the tribunal often

> substitutes its own version of events without evidence to support its conclusions.
>
> 7. A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman, Immigration Law and Practice (Markham, ON: Butterworths, 1992) at 8.22]
>
> [Emphasis added]

It is not difficult to understand that, to be fair to a person who swears to tell the truth, concrete reasons supported by cogent evidence must exist before the person is disbelieved. Let us be clear. To say that someone is not credible is to say that they are lying. Therefore, to be fair, a decision-maker must be able to articulate why he or she is suspicious of the sworn testimony, and, unless this can be done, suspicion cannot be applied in reaching a conclusion. The benefit of any unsupported doubt must go to the person giving the evidence.

2. *The provision of clear reasons*

The Federal Court of Appeal impresses a decision-making duty on the CRDD in *Hilo v. Canada (M.E.I.)* (1991), 15 Imm. L.R. (2d) 199 (F.C.A.) at paragraph 6 as follows:

> In my view, the board was under a duty to give its reasons for casting doubt upon the appellant's credibility in clear and unmistakable terms. The board's credibility assessment, quoted supra, is defective because it is couched in vague and general terms.

> In addition, as expressed in *Leung v. Canada (M.E.I.)* (1994), 81 F.T.R. 303 at paragraph 14, the duty to be clear is linked to a requirement to state the evidence:
> The Board is under a very clear duty to justify its credibility finding with specific and clear reference to the evidence**.**
>
> [Emphasis added]

3. *The use of specialized knowledge*

The standard for making implausibility findings, as stated by Justice Muldoon in *Valtchev*, requires that unmet reasonable expectations must exist before a refugee claimant's evidence is found implausible. It is only fair that, since the reasonable expectations which exist in the mind of the decision-maker constitute evidence to be used in reaching a decision, the expectations should be exposed to the claimant prior to the decision being made so that the claimant might have an opportunity to rebut them with evidence. Indeed, this due process principle is now codified in the specialized knowledge provision of Rule 18 of the *Refugee Protection Division Rules*, Can. Reg. 2002-228:

SPECIALIZED KNOWLEDGE	CONNAISSANCES SPÉCIALISÉES
Notice to the parties	Avis aux parties
18. Before using any information or opinion that is within its specialized knowledge, the Division must notify the claimant or protected person, and the Minister if the Minister is present at the hearing, and give them a chance to	18. Avant d'utiliser un renseignement ou une opinion qui est du ressort de sa spécialisation, la Section en avise le demandeur d'asile ou la personne protégée et le ministre -- si celui-ci est présent à l'audience -- et leur donne la possibilité de :
(a) make representations on the reliability and use of the information or opinion; and	a) faire des observations sur la fiabilité et l'utilisation du renseignement ou de l'opinion;
(b) give evidence in support of their representations.	b) fournir des éléments de preuve à l'appui de leurs observations.

[Emphasis added]

[6] With respect to the RPD's subjective comments in the decision under review, during the course of oral argument neither Counsel for the Applicants or Respondent could confirm that notice under Rule 18 had been given.

[7] As the decision under review fails to apply the law on credibility, I find the decision under review is made in reviewable error.

ORDER

The decision under review is set aside and the matter is referred back for redetermination before a differently constituted panel.

There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

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DOCKET:	IMM-806-10
STYLE OF CAUSE:	SANDRA MILENA DIAZ PINZON; JHON EDGAR NAVAS OJEDA; ANDRES FELIPE NAVAS DIAZ v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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