Date: 20060410

Docket: IMM-2034-05

Citation: 2006 FC 404

BETWEEN:

LUIS ALEJANDRO LEMUS ORTIZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON J.

INTRODUCTION

[1] The Applicant is a twenty-three year old citizen of Guatemala who arrived in Canada on the 24th of July, 2004 and shortly after arriving made a claim to Convention refugee status or like protection in Canada on the basis of an alleged well founded fear of death at the hands of members of a youth gang in Guatemala known as "Mara 18". The Applicant's claim was rejected by the Refugee Protection Division (the "Board") of the Immigration and Refugee Board. These reasons follow the hearing of a number of issues raised in an application for judicial review of that decision. Other issues, generally referred to as "reverse order questioning" issues or

Chairperson's Guideline 7 issues were heard by a different judge and will be dealt with in separate reasons and a separate decision.

BACKGROUND

[2] The Applicant alleges that two of his former school-mates, Marcos and Oseas, are members of the Guatemalan youth gang, Mara 18 and that they have been pressuring him to join their gang. He has refused their "invitations". In the result, he alleges that on the 7th of December, 2003 his two former school-mates and other gang members beat him and warned him that he would be beaten again if he did not join Mara 18. That same day, the Applicant reported the event to the police who merely suggested he should consider relocating.

[3] Marcos and Oseas were apparently arrested and jailed for robbery early in 2004. The Applicant fears that they connect the arrests to the Applicant's report to the police.

[4] By early April, 2004, Marcos and Oseas were out of jail. They again confronted the Applicant and beat him and robbed him. The Applicant alleges that on that occasion, Marcos told him that "the next time, we will kill you." Further threats apparently followed. The Applicant alleges that he quit his job and his school and went into hiding at the home of his brother outside of Guatemala City.

[5] In June of 2004, the Applicant alleges that he returned to Guatemala City to visit his sick mother. He again encountered a member of Mara 18, not Marcos or Oseas, who again threatened him. The Applicant alleges that he again went to the police and also to a victims' office despite the fact that he could not identify the gang member who confronted him. The confrontation of June, 2004 is not recorded in the Applicant's Personal Information Form narrative or in an extensive amendment to that form that was later filed with the Board.

THE DECISION UNDER REVIEW

[6] After dealing extensively with the "reverse-order questioning" or Chairperson's Guideline 7 issues, the Board turned to the substantive elements of the Applicant's claim to protection. It first dealt with country conditions issues in Guatemala. It concluded its brief review in this regard by citing submissions of counsel for the Applicant to the effect that the "iron-fisted" reaction of police in Guatemala was only exacerbating the already terrible crime situation. Of note is the fact that in this portion of its reasons, the Board made no specific reference to the prevalence of youth gangs, and, in particular, the one that the Applicant alleges he fears in Guatemala, and to their violent nature.

[7] The Board concludes this portion of its reasons for decision in the following terms: " This then is the context in which any Guatemalan claim must be framed." I will return to the absence of any reference to youth gangs as a portion of that context later in these reasons.

[8] The Board then turns to an examination of the Applicant's allegations giving rise to his alleged subjective fear. It comments on the December 2003 and the April 2004 confrontations. It notes the police report and a note from the victims' office, each dated June, 2004. The Board then states: "The claimant had no reported problems in June 2004." While this statement is accurate if one looks only at the Applicant's Personal Information Form narrative and the amendment thereto, it is not stated to be so limited and it is directly contradicted by a review of the Applicant's testimony before the Board. Nonetheless, the Board then goes on to acknowledge that testimony and finds it "highly improbable". Further, the Board finds the police report and the note from the victims' office not to be trustworthy or reliable. It then goes on to write:

> While it may be that the claimant has been beaten up and robbed by unknown assailants on April 02, 2004 I am unable to accept that this single un-contradicted event constitutes persecution, a risk to the claimant's life or a future risk of torture.[1]
>
> [emphasis added]

The foregoing passage appears to ignore the confrontation and beating in December of 2003, earlier acknowledged by the Board.

[9] Finally, the Board concludes:

> Because of this central contradiction laying at the heart of his allegations I find that the allegations contained in this claim are not credible and that there is no subjective basis for a fear of serious harm to this claimant in Guatemala.[2]
>
> [emphasis added]

[1] Tribunal Record, page 18.
[2] Tribunal Record, page 19.

Despite the valiant efforts of counsel for the Respondent, I am satisfied that it is impossible on the face of the Board's reasons to identify an antecedent for "this central contradiction" identified in the foregoing quotation.

THE ISSUES

[10] In the Memorandum of Argument filed on behalf of the Applicant, counsel identified the following issues:

> a) Did the Board err in fact and law in ignoring or misinterpreting evidence, in particular the plausible explanations given by the Applicant in relation to his assailants;
> b) Did the Board err in fact and law in ignoring or misinterpreting other evidence related to both the objective and subjective basis of the Applicant's refugee claim;
> c) Did the Board err in law in failing to apply the proper test in assessing the subjective basis of the Applicant's claim, and in particular in finding that there was no subjective basis to the Applicant's refugee claim because of its finding with respect to the two police reports;
> d) Did the Board err in law in breaching the rules of procedural fairness and natural justice by explicitly stating at the hearing that the Applicant's explanations with respect to these reports were "logical", and then finding in its decision that they were not trustworthy or reliable.[3]
> …

[11] At the opening of the hearing before the Court, and in interventions during the hearing, the Court expressed concern regarding the adequacy of the Board's reasons for rejecting the Applicant's claim. Put another way, the Court expressed concern as to whether the Board breached the rules of procedural fairness and natural justice by failing to adequately articulate its grounds for rejecting the Applicant's claim. At the close of hearing, I advised counsel that the Applicant's application for judicial review would be allowed on the basis of the inadequacy of the Board's reasons, once again despite the valiant efforts of counsel for the Respondent to extrapolate from the words of the Board to provide an adequate and sustainable

[3] Applicant's Application Record, page 256.

explanation for the Board's conclusion. In the result, I will not address in these reasons the issues raised directly on behalf of the Applicant.

ANALYSIS

[12] I have earlier referred in these reasons to the Board's country conditions analysis which it provides to set the "context" for the analysis of the Applicant's specific claim. The country conditions analysis makes no reference to the documentary evidence that was before the Board and that speaks eloquently to the prevelance, nature and impact of youth gangs in Guatemala. In an announcement entitled "InterAmerican Commission to Review War on Youth Gangs" that appears at pages 181 and 182 of the Tribunal Record, the following paragraph appears:

> According to local authorities 60,500 people, including many children, belong to gangs in Central American countries. In Honduras, it is estimated that the "maras" (the Spanish term for youth gangs) have 36,000 members, 65% of the total in Central America. There are 14,000 in Guatemala, 10,500 in El Salvador, 4,500 in Nicaragua, 2,600 in Costa Rica, 1,385 in Panama and 100 in Belize.

That document is dated the 1st of June, 2005.

[13] In a May/June 2004 report entitled "Central America/Mexico Report" that appears at pages 183 and 184 of the Tribunal Record, the following passages appear:

> According to Latin America Data Base (LADB), police forces in the region report that there are over 69,000 gang members organized into 920 gangs, while other sources put the number as high as half a million. "Police reports from the various countries indicate that in Guatemala 20 percent of homicides are committed by gang members, and in Honduras and El Salvador the figure rises to 45 percent."
> …
> Indeed, brutality has become a hallmark of gang operations, a method of sending defiant messages to government authorities bent on cracking down on gang members, for enforcing intra-gang loyalty, and for punishing rivals.

[14] In a report from the Resource Center of the AMERICAS.ORG entitled Mega-March Against Violence and published at Guatemala City on the 14th of August, 2004, the following passage appears:

> Mara 18 and Mara Salvatrucha are Guatemala's most feared criminal gangs. According to Berger, the two bands are responsible for 80 percent of the crime in this Central American nation.[4]

[15] I am satisfied that the foregoing passages, and there are others to much the same effect in the material that was before the Board, are case specific to the context of the Applicant's claim since he alleges that it is members of Mara 18 that he fears.

[16] Similarly, the statement in the Board's reasons that: "The claimant had no reported problems in June 2004", earlier referred to, even when read in context, of which there is little, ignores the Applicant's testimony before the Board.

[17] Finally, and this issue once again was earlier referred to in these reasons, the Board's reference to a "central contradiction" at the heart of the Applicant's allegations simply defies identification of any "central contradiction" that the Board had in mind.

[18] I am satisfied that the foregoing concerns are all central to the Board's conclusion.

[4] Tribunal Record, page 187.

[19] In *Adu et al. v. The Minister of Citizenship and Immigration*[5] my colleague Justice MacTavish wrote at paragraphs [10], [11] and [14] of her reasons:

> In *Baker*, the Supreme Court of Canada noted that in certain circumstances, the duty of procedural fairness requires the provisions [sic] of written reasons for a decision. This is especially so where, as in this case, the decision has important ramifications for the individual or individuals in question. According to the Court, "It would be unfair if the person subject to a decision such as this one which is so critical to their future were not to be told why the result was reached:" …
>
> The importance of providing 'reasoned reasons' was reiterated by the Supreme Court three years later in R. v. Sheppard [2002] 1 S.C.R. 869, …where the Court noted that unsuccessful litigants should not be left in any doubt as to why he or she was not successful. Although Sheppard was a criminal case, the reasoning in that case has been applied in the administrative law context generally, and in the immigration context in particular, …
> ….
> In my view, these 'reasons' are not really reasons at all, essentially consisting of a review of the facts and the statement of a conclusion, without any analysis to back it up. …[6]
>
> [some citations omitted]

[20] While the issue here is not reasons that are simply a review of the facts and the statement of a conclusion, I am satisfied that my colleague's reasoning applies equally to reasons that are incomplete in their analysis of the context of the Applicant's claim, simply incorrect in the statement that the claimant, here the Applicant, had no reported problems in June 2004" and, with great respect, simply incomprehensible in their reference to a "central contradiction".

[21] I am satisfied that the concerns to which I have referred demonstrate that the Board simply failed to effectively consider the Applicant's claim. In so doing, I am further satisfied that the Board breached the rules of procedural fairness and natural

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[5] 2005 FC 565, April 26, 2005, [2005] F.C.J. No. 693.

[6] The reference to "Baker" in the first quoted paragraph is to *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, and, more particularly, to paragraph 43 of the reasons for decision therein where the quoted sentence appears in the following terms: "It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached."

justice by effectively failing to provide the Applicant with any rational explanation as to why it chose to reject his claim.

[22] Where a breach of procedural fairness and natural justice is found, no pragmatic and functional analysis to establish a standard of review is required. The decision under review must be set aside.[7]

CONCLUSION

[23] In the result, this application for judicial review will be allowed on the issues here before the Court only, the decision under review will be set aside and the Applicant's claim will be referred back to the Immigration and Refugee Board for re-hearing and re-determination by a differently constituted panel. In light of the fact that aspects of this application for judicial review are being considered by another judge and that a separate decision will issue with respect to the "reverse order questioning" or Chairperson's Guideline 7 issues, the Court will direct that the further hearing before the Board be deferred until any appeal of the decision regarding other aspects of this application for judicial review is disposed of in the Federal Court of Appeal or the time in which a party may file a notice of appeal to that Court has expired, whichever last occurs. Whether any further delay should be directed is a matter for the Federal Court of Appeal to determine.

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[7] See: *Shaker v. Canada (Minister of Citizenship and Immigration)* 2006 FC 185, February 10, 2006.

[24] At the close of hearing, counsel were advised that this application for judicial review, or, more particularly, the portions of this application for judicial review that were here before the Court, would be allowed. Neither counsel recommended certification of a question. No question will be certified.

"Frederick E. Gibson"
JUDGE

Ottawa, Ontario
April 10, 2006

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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