Date: 20061026

Docket: IMM-1233-06

Citation: 2006 FC 1270

Ottawa, Ontario, the 26th day of October 2006

Present: The Honourable Mr. Justice Shore

BETWEEN:

ELIZABETH ALFARA BARAHONA
LOURDES MARIA ALFARO RAMOS

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is not a game of numbers but, it seems to me, when the Board has found numerous reasons for doubting a claimant's credibility and was patently wrong in selecting a significant majority of them, it must be clear to a reviewing authority that those remaining were properly considered. That is by no means clear here. Explanations which, to say the least, were not obviously implausible were offered and were simply not dealt with by the Board in its decision. The failure to take account of material evidence has been variously characterized by this Court in allowing s. 28 applications. In *Toro v. M.E.*I., [1981] 1 F.C. 652, my brother Heald, for the Court, said:

> It appears therefore that the Board, in making its decision, has not had regard to the totality of the evidence properly before it. It has therefore erred in law.

(*Owusu-Ansah v. Canada* (*Minister of Employment and Immigration*), [1989] F.C.J. No.442 (QL).)

NATURE OF THE LEGAL PROCEEDING

[2] This is an application for judicial review, brought under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), against a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board) dated February 9, 2006, ruling that the applicants are not “Convention refugees” or “persons in need of protection” within the meaning of sections 96 and 97 of the Act.

FACTS

[3] The applicants, Elizabeth Alfaro Barahona, 22 years of age, and her cousin, Lourdes Maria Alfaro Ramos, 20 years of age, both citizens of Honduras, allege having a well-founded fear of persecution because of the serious harm they would suffer if they were to return to their country of origin.

[4] The applicants allege the following facts:

[5] Ms. Barahona and Ms. Ramos are the daughters of two brothers, Manuel de Jesus Alfaro Escobar and José de Jesus Alfaro Escobar. Since 1997, the brothers have owned a company called “Transportes Alfaro”. The applicants are very involved in the operations of the family’s company.

[6] Transportes Alfaro is a competitor of another transportation company, “Transportes Galeas”, which belongs to the Galeas family. Over time, rivalries between the two companies became vicious, as the Galeas family used all kinds of tactics to get rid of its competitor.

[7] On December 22, 2004, Mr. Galeas shot out the tires of the Alfaro family’s bus. Following a complaint filed by the Alfaro family, Mr. Galeas was summoned to the police station. However, after paying bail, he was quickly released.

[8] On February 26, 2005, two armed persons climbed aboard the Alfaro family bus to commit a robbery. One passenger reacted quickly, immediately killing one of the robbers, while the other fled. Both intruders were employees of the Galeas family.

[9] After this incident, the Alfaro family and their bus driver received death threats from members of the Galesa family. As a result of these threats, the bus driver resigned. From March 9, 2005, Jesus Abrego Alfaro, a cousin of the Alfaro family, took over as bus driver. Jesus Abrego Alfaro was murdered on March 30, 2005. The Galeas family was suspected of instigating the crime. Following this terrible event, the Alfaro family received more death threats.

[10] In order to protect them, the parents of Ms. Barahona and Ms. Ramos arranged for them to leave Honduras. The applicants left the country on April 7, 2005, and entered the United States illegally on May 2, 2005. On August 7, 2005, they arrived in Canada and claimed refugee protection. Their claims for refugee protection were heard by the Board on December 1, 2005.

IMPUGNED DECISION

[11] The Board rejected the claims for refugee protection made by Ms. Barahons and Ms. Ramos. According to the Board, the applicants "failed to show that they had a well-founded fear of persecution". In addition, the Board did not believe that they could be "subjected to a risk to their lives or to a risk of cruel and unusual treatment or punishment if returned to their country". The Board invoked four reasons in support of its decision:

[12] First of all, there are major contradictions between the following three pieces of evidence: (1) the statements at the port of entry; (2) Ms. Barahona's Personal Information Form (PIF); and (3) the testimony and documentary evidence submitted by Ms. Barahona and by Ms. Ramos. The contradictions are as follows:

(a) The first contradiction concerns the reason for which the applicants are the two persons in their family at the greatest risk of being killed. At the interview at the port of entry, Ms. Ramos stated that the whole family had been threatened with death. However, Ms. Barahona stated that she and her cousin received the most death threats because they were the eldest children of the Alfaro family. They both repeated this statement at the hearing. However, the evidence shows that they both had elder brothers and sisters;

(b) The second contradiction concerns the date on which their problems began. At the port-of-entry interview, Ms. Barahona and Ms. Ramos stated that their problems had begun in January 2005. However, in her PIF, Ms. Barahona states that the first serious incident was the armed attack on the family bus on December 22, 2004. In addition, at the hearing, Ms. Barahona and Ms. Ramos submitted that the death threats against the Alfaro family had

begun in January 2005. Nevertheless, Ms. Barahona's PIF does not mention any threat received in January 2005;

(c) The third contradiction concerns the date on which the applicants decided to leave Honduras. At her port-of-entry interview, Ms. Barahona claimed that she had decided to leave Honduras in February 2005 after having received threatening letters from the Galeas family. According to her PIF and the letter from the applicants' parents, they supposedly decided to leave the country on March 30, 2005, after Jesus Abrego Alfaro was murdered. At the hearing, Ms. Barahona restated that she had been urged to leave the country in February 2005, following the incident on February 26, 2005, during which an intruder was allegedly killed on the bus.

[13] Secondly, Ms. Barahona and Ms. Ramos explained the discrepancies between their written narratives and their statements at the port of entry by stating that they were nervous at the time of the port-of-entry interview, since they had travelled through several countries before arriving in Canada. However, the Board was of the view that these explanations were unsatisfactory, because it appears that the applicants stayed with an uncle in New York for three months before entering Canada.

[14] Thirdly, Ms. Barahona and Ms. Ramos did not submit any evidence proving that they were in Honduras from January to March 2005.

[15] Fourthly, Ms. Barahona and Ms. Ramos did not submit any evidence connecting them personally to the alleged incidents:

(a) A summons addressed to Mr. Galeas on December 22, 2004, seems to confirm that there was an incident on that date, but it does not connect Ms. Barahona and Ms. Ramos to it;

(b) Although Ms. Barahona claims to have gone to the police station with her father and uncle to file a complaint on December 22, 2004, no police report was submitted in evidence before the Board;

(c) The death certificate does not establish any connection between the murder of Jesus Abrego Alfaro on March 30, 2005, and the rivalry between the Alfaro and Galeas families;

(d) The Board considered a letter written by the fathers of the applicants and signed the day before the hearing, but it was of the opinion that this letter was clearly intended to corroborate the applicants narratives and refused to attach any probative value to it.

ISSUES

1. Did the Board make a patently unreasonable error in finding Ms. Barahona and Ms. Ramos not to be credible?
2. Did the Board err in attaching no probative value to the letter written by the fathers of Ms. Barahona and Ms. Ramos?
3. Did the Board make a mistake in law in relying on *Sheikh v. Canada* (*Minister of Employment and Immigration*), [1990] 3 F.C. 238, [1990] F.C.J. No. 604 (QL)?

STANDARD OF REVIEW

[16] Assessing the credibility of witnesses and weighing the evidence is part of the Board’s jurisdiction. The Board has well-established expertise in deciding questions of fact and, more

specifically, in assessing the credibility and the subjective fear of refugee protection claimants. (*Cepeda-Gutierrez v. Canada* (*Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (QL), at paragraph 14.)

[17] In the context of an application for judicial review bearing on issues of credibility, the standard of review which must be applied is patent unreasonableness. The Court must show considerable judicial deference, as it is up to the Board to assess the testimonies of the applicants and the credibility of their statements. If the Board's conclusions are reasonable, intervention is unwarranted. However, the Board's decision must be based on the evidence. It must not be made capriciously on the basis of erroneous findings of fact or without regard for the material before it. (*Mugesera v. Canada (Minister of Citizenship and Immigration*), [2005] 2 S.C.R. 100, [2005] S.C.J. No. 39 (QL), at paragraph 38; *Aguebor v. Canada* (*Minister of Citizenship and Immigration*), [1993] F.C.J. No. 732 (QL), at paragraph 4.)

ANALYSIS

1. Did the Board make a patently unreasonable error in finding Ms. Barahona and Ms. Ramos not to be credible?

[18] In its decision, the Board referred to several inconsistencies and contradictions between the statements at the port of entry, the PIF, and the testimony given by Ms. Barhona and Ms. Ramos. Following a thorough review of the documentary evidence and the minutes of the hearing, the Court is of the opinion that the discrepancies identified by the Board are not actual contradictions, but rather obvious misunderstandings.

[19] The first contradiction identified by the Board, concerning whether Ms. Barahona and Ms.Ramos are the eldest children in the Alfaro family, is a misunderstanding which may be understood on reading the testimony given by the applicants at the hearing.

[20] The Board wrote the following on this point:

> . . . However, Elizabeth stated that she and her cousin Lourdes were the two family members most threatened because they were the oldest. They both repeated this statement at the hearing. However, this is clearly incorrect. Elizabeth has a brother, Daniel, born in 1971, who is 12 years her senior, and her cousin Lourdes also has three older brothers and two older sisters. At the hearing, Elizabeth justified her incorrect statements by saying that her older brother married very young and is no longer involved in the family business. Lourdes said that her older sisters and brothers no longer live at home. The panel does not find these explanations satisfactory and believes that the claimants knowingly sought to dramatize their personal situations. Such behaviour impairs their credibility.

[21] However, at the hearing, Ms. Barahona and Ms. Ramos explained why they claimed to be the "eldest" of the Alfaro family.

[22] Ms. Barahona stated the following:

> [TRANSLATION]
> Q. And you answered a little earlier, Ms. Elizabeth Alfaro, that you were the only one who left her country because you were the person who knew the most about the operations of the transportation company, and because you were the eldest children in the two (2) families.
>
> A. Yes.
>
> Q. But basically, according to your PIFs, you are not the eldest children in the families. You have a brother, Daniel, who was born in '71.
>
> A. He married when he was very young. He always lived far from us. He never had this relationship, a connection with my parents.

[23] For her part, Ms. Ramos gives the following explanation:

> [TRANSLATION]
> A. In my case, I say I am the eldest daughter, because I lived only with my mother, father and youngest sister. My other brothers also live in the country, but they live elsewhere; they have their own employment.

[24] The answers given by Ms. Barahona and Ms. Ramos are satisfactory. In mentioning that they were the eldest children of the Alfaro family, they meant to say they were the only children still living with their parents and taking care of company business. It is therefore on the basis of this connection with the family company and the rivalry with the Galeas family that they fear coming to harm if they return to Honduras.

[25] In a similar case, the Court ruled that findings of a lack of credibility based on inconsistencies may be subject to review in an application for judicial review. (*Singh v. Canada* (*Minister of Citizenship and Immigration*), 2006 FC 357, [2006] F.C.J. No. 426 (QL); *R.K.L. v. Canada* (*Minister of Citizenship and Immigration*), 2003 FCT 116, [2003] F.C.J. No. 162 (QL).)

> 21. In my opinion, it is a very minor contradiction that may be understood on reading the applicant's testimony. Such a contradiction does not undermine the applicant's credibility. The RPD should not be overly zealous in its pursuit to find inconsistencies where there are none.

[26] In that case, the Court stated that the Board's decision was based on certain mistakes of fact and misunderstandings that could not undermine the applicant's credibility.

[27] In the case at bar, the question of whether the applicants were the eldest daughters of the Alfaro family is not decisive. Accordingly, the Board erred in finding a lack of credibility on the basis of a misunderstanding unrelated to the crux of the claim.

[28] The second contradiction noted by the Board concerning the date on which the applicants' problems began and the date on which they decided to leave Honduras is not an actual contradiction, but rather an inaccuracy which may be understood in the light of the explanations given by Ms. Barahona at the hearing.

[29] On this point, the Board wrote the following:

> During the interview at the port of entry on August 7, 2005, both claimants said that their problems had begun in January 2005, in contrast to the detailed narrative attached to Elizabeth's Personal Information Form (PIF), according to which the first serious incident was the armed attack on the family bus that occurred on December 22, 2004, when she was on board to collect fares from the passengers.

[30] At the hearing Ms. Barahona explained this discrepancy as follows:

> [TRANSLATION]
> Q. When you arrived in Canada, you had an interview with an immigration officer?
>
> A. Yes.
>
> Q. In this interview, Elizabeth, you stated that the problems had begun in January 2005.
>
> A. Because the real problem had begun in February 26, but before that, there were always threats and all that.
>
> Q. Yes, but you stated that the problems began in January 2005.
>
> Q. Why did you say that?
>
> A. Because were (sic) the biggest important problems between the Galeas family and us.
>
> Q. What was that?
>
> A. That was when they started to threaten me with death.

> Q. But the incident of December 22, 2004, when they shot at the bus, that wasn't a serious incident?
>
> A. No, but after that incident they threatened us personally.
>
> Q. Yes, but what was so serious in January 2005?
>
> A. They threatened us, they tried to confine and kidnap us, but they didn't succeed.

[31] First of all, Ms. Barahona's answers are consistent. She specified that the threats began on December 22, 2004, which is consistent with her PIF. She then explained the events which occurred in January and February 2006. Her fear of persecution increased following these incidents. The Board had documents corroborating the fact that Mr. Galeas was under investigation on December 22, 2004. Therefore, it appears that the problems of the Alfaro family began on that date.

[32] The third contradiction identified by the Board concerns the date on which the applicants decided to leave Honduras.

[33] The Board wrote the following on this point:

> Elizabeth claimed during the interview at the port of entry on August 7, 2005, that she had decided to leave the country in February 2005 after receiving threatening letters. However, according to her PIF, her parents and those of her cousin decided that they should leave the country after the murder of their cousin on March 30, 2005. When confronted with this discrepancy, they said that it had been suggested to them that they leave in February 2005, following the incident that occurred on the bus on February 26, 2005, during which an intruder was allegedly killed. The panel does not find this explanation convincing, since this information is omitted in her PIF.

[34] First of all, the explanations given by the applicant <u>do not have to be "convincing"</u>, as the Board states. <u>Rather, their explanations have to be reasonable</u>. As stated in *Owusu*, *supra*, explanations which are not obviously implausible must be taken into account.

> . . . This is not a game of numbers but, it seems to me, when the Board has found numerous reasons for doubting a claimant's credibility and was patently wrong in selecting a significant majority of them, it must be clear to a reviewing authority that those remaining were properly considered. That is by no means clear here. Explanations which, to say the least, Were not obviously implausible were offered and were simply not dealt with by the Board in its decision. The failure to take account of material evidence has been variously characterized by this Court in allowing s. 28 applications. In *Toro v. M.E.I.*, [1981] 1 F.C. 652, my brother Heald, for the Court, said:
>
>> It appears therefore that the Board, in making its decision, has not had regard to the totality of the evidence properly before it. It has therefore erred in law.

[35] In the case at bar, the explanations given by Ms. Barahona are plausible. It is possible that she decided to leave following the incident on February 26, 2005. This decision was confirmed when Jesus Abrego Alfaro was murdered on March 30, 2005. There are no real contradictions in the facts submitted. On the whole, the story is consistent, and the chronology of events is plausible.

[36] Accordingly, the Board made a patently unreasonable error in finding the applicants not to be credible.

2. Did the Board err in not attaching probative value to the letter written by the fathers of Ms. Barahona and Ms. Ramos?

[37] In this case, the Board did not attach any probative value to the letter written by the fathers of Ms. Barahona and Ms. Ramos, because it was “clearly designed to corroborate the claimants’ written narrative”.

[38] The Board states the following it its decision:

> The panel further notes that the death certificates do not establish a link between the murder of the claimants' cousin on March 30, 2005, and the rivalry between their family and the Galeas family. Even less so do they explain why the claimants were the main targets of the Galeas family after this unfortunate incident. Again, the panel received no police report in evidence, but rather a letter signed by the fathers of the two claimants . . . .
>
> The panel believes that this letter does nothing to explain why the claimants are more at risk than the other members of the family who are still in Honduras . . . .

[39] However, this letter explains two important elements: (1) the reasons why the applicants were more at risk than other members of their family from the death threats made by the Galeas family; and (2) the connection between the murder of Jesus Abrego Alfaro and the rivalry between the Alfaro and Galeas families.

[40] It is true that it is up to the Board to consider the evidence and assess its probative value. Furthermore, the Board is not bound by "self-serving" evidence if the testimony of the refugee protection claimant is found not to be credible. However, the contradictions on which a finding of a lack of credibility is based must be obviously implausible, which is not the case here. Likewise, the Board must give reasons for its decision when it decides not to attach any probative value to the evidence submitted, especially when, as in the present case, the genuineness of the evidence is not contested.

[41] In *Ngoyi v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 272 (QL), Madam Justice Danièle Tremblay-Lamer had to rule on documentary evidence, the genuineness of which was not contested. She wrote the following:

> 13. . . . The Refugee Division did not question the document's authenticity, so it should at least have recognized that this evidence did not contradict the applicant but corroborated his story as to the fact that he is described by the UDPS authorities as a UDPS fighter and that his disappearance was noted . . . .

[42] In the case at bar, the Board erred in failing to give reasons for its decision not to attach any probative value to the letter written by the fathers of the applicants. They are entitled to submit documents which corroborate their narrative, especially when this evidence directly supports their allegations.

3. Did the Board make a mistake in law in relying on *Sheikh, supra?*

[43] In its decision, the Board relied on *Sheikh*, *supra*, to justify its finding Ms. Barahona and Ms. Ramos not to be credible. However, *Sheikh* does not apply to the case at bar.

[44] The Board states the following on this point:

> . . . [E]ven without disbelieving every word an applicant has uttered, a first-level panel may reasonably find him so lacking in credibility that it concludes there is no credible evidence relevant to his claim... In other words, a general finding of a lack of credibility on the part of the applicant may conceivably extend to all relevant evidence emanating from his testimony.

[45] As affirmed in *Foyet v. Canada* (*Minister of Citizenship and Immigration*), [2000] F.C.J. No. 1591 (QL), at paragraphs 13-15, the reference to *Sheikh* is a mistake in law:

> > [13] The panel justified this conclusion by relying on Mr. Justice MacGuigan's comments in *Sheikh*, which the panel believed to be directly applicable in this case. However, the panel failed to distinguish that case as warranted by the new legislative framework. The panel quoted the following passage from *Sheikh*:

> ... [E]ven without disbelieving every word an applicant has uttered, a [panel] may reasonably find him so lacking in credibility that it concludes there is no credible evidence relevant to his claim ... In other words, a general finding of a lack of credibility on the part of the applicant may conceivably extend to all relevant evidence emanating from his testimony.
>
> [14] Applying these principles to this case, the panel found that, having determined that the applicant was not credible, it could reject his claim and subsequently make a finding that the applicant had no credible basis for his claim.
>
> [15] In my view, the panel thereby erred in law by giving subsection 69.1(9.1) an interpretation no longer justified by Sheikh, as that case was decided under a completely different legislative framework.

[46] Although this decision was based on the former *Immigration Act*, it is still valid. In fact, within the legislative framework of the Act, “a tribunal’s perception that a claimant is not credible on an **important element** of their claim can amount to a finding that there is no credible evidence to support the claim” (*Chavez c. Canada* (*Minister of Citizenship and Immigration*), 2005 FC 962, [2005] F.C.J. No. 1211 (QL),at paragraph 7; *Touré v. Canada* (*Minister of Citizenship and Immigration)*, 2005 FC 964, at paragraph 10, [2005] F.C.J. No. 1213 (QL).)

[47] At any rate, this decision does not apply in the case at bar, because finding Ms. Barahona and Ms. Ramos not to be credible on the basis of the contradictions between the interviews at the port of entry, the PIF, and the testimonies at the hearing do not concern either the crux of their claims or even real contradictions, but rather misunderstandings.

[48] Therefore, in rejecting all of the evidence on the basis of the principle in *Sheikh*, *supra*, the Board made a mistake in law.

CONCLUSION

[49] For these reasons, this application for judicial review is allowed, the Board's decision is set aside, and the matter is referred back to a differently constituted panel for rehearing and redetermination.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed and that the matter be referred back to a differently constituted panel for redetermination.

"Michel M.J. Shore"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1233-06
STYLE OF CAUSE:	ELIZABETH ALFARO BARAHONA LOURDES MARIA ALFARO RAMOS v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 11, 2006
REASONS FOR JUDGMENT BY:	THE HONOURABLE MR. JUSTICE SHORE
DATED:	October 26, 2006

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