Date: 20070703

Docket: IMM-4563-06

Citation: 2007 FC 690

Ottawa, Ontario, July 3, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SALVADOR AYALA;
CARLOS ALEXANDER AYALA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] An important indicator of credibility is the consistency with which a witness has told a particular story. (Reference is made to *Canada (Minister of Employment and Immigration) v. Dan-Ash* (F.C.A.), [1988] F.C.J. No. 571 (QL).)

Inconsistent testimony and contradictions on significant elements related to the core issue of a claim weaken the applicant's credibility.

"The subjective basis for the fear of persecution rests solely on the credibility of the applicants." (*Maximilok v. Canada (Minister of Citizenship and Immigration)* (F.C.T.D.), [1998] F.C.J. No. 1163 (QL), justice Louis-Marcel Joyal.)

Genuine convention refugees can be expected to seek protection as soon as reasonably practicable when they are outside of the reach of the oppressors. (*Ilie v. Canada (Minister of Citizenship and Immigration)* (F.C.T.D.), [1994] F.C.J. No. 1758 (QL), Justice Andrew McKay.)

JUDICIAL PROCEDURE

[2] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board) rendered on July 18, 2006, wherein it found the Applicant neither a Convention refugee nor a person in need of protection pursuant to section 96 and subsection 97(1) of the IRPA.

BACKGROUND

[3] The principal Applicant, Mr. Carlos Alexander Ayala and his uncle, Mr. Salvador Ayala, are citizens of El Salvador, who claim to have a well-founded fear of persecution at the hands of gang members in El Salvador. Their fear is based on an alleged attack by members of the Mara Salvatrucha gang, in which the principal Applicant was allegedly shot and wounded, and his friend, Mr. Heriberto Arévalo was allegedly shot and killed.

[4] Following this incident, the principal Applicant identified the two attackers to the police but refused to make a declaration because he allegedly received threatening phone calls warning him not to speak with the police.

[5] On March 13, 2005, the principal Applicant went to stay with an aunt and cousin in San Salvador.

[6] On April 14, 2005, upon returning to his mother's house in Sonsanate, the principal Applicant discovered that the police were still looking for him. He and his uncle therefore decided to leave El Salvador and come to Canada.

[7] On July 5, 2005, the Applicants entered the United States without claiming refugee status, before coming to Canada on September 22, 2005.

DECISION UNDER REVIEW

[8] In its decision rendered on June 18, 2006, the Board determined that state protection is available to the Applicants, noting that El Salvador is a constitutional, multiparty democracy that respects human rights, appears able and willing to offer protection to its nationals, is in effective control of its territory, and has its own military and civil authorities.

[9] Moreover, the Board determined that the Applicants lacked credibility due to inconsistencies and contradictory found in their testimonies which failed to provide the Board with trustworthy and reliable evidence concerning their fear of gangs in El Salvador.

[10] Furthermore, the Board noted that while the Applicants had had the opportunity to seek refugee protection in the United States, they had chosen not to do so. In this regard, the Board found that the Applicants did not provide a satisfactory explanation for the delay in applying for refugee status in Canada.

[11] Finally, the Board rendered a decision on July 18, 2006, wherein it found the Applicant neither a Convention refugee nor a person in need of protection pursuant to section 96 and subsection 97(1) of the IRPA.

ISSUES

[12] (1) Did the Board err in its finding on state protection?

(2) Did the Board err in ignoring evidence?

(3) Did the Board err in its credibility finding?

STATUTORY SCHEME

[13] Section 96 of the IRPA reads as follows:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être

religion, nationality, membership in a particular social group or political opinion,	persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[14] Subsection 97 (1) of the IRPA states the following:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(*b*) to a risk to their life or to a risk of cruel and unusual	*b*) soit à une menace à sa vie ou au risque de traitements

treatment or punishment if	ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

STANDARD OF REVIEW

[15] In regard to state protection, Justice Danièle Tremblay-Lamer in *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, [2005] F.C.J. No. 232 (QL), at paragraph 11, after conducting a pragmatic and functional analysis, determined that the assessment of state protection involves the application of the law to the facts and as such is a question of mixed law and

fact, reviewable on the reasonableness *simpliciter* standard. This being said, there is no reason to diverge from this standard in the case at bar. With respect to state protection, a finding by the Board will not be overturned where such a finding is supported by reasons that can withstand a somewhat probing examination. (*Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.)*, [1997] 1 S.C.R. 748, at paragraph 56.)

[16] In regard to credibility findings, it is trite law that the Board has a well-established expertise in the determination of questions of facts, particularly in the evaluation of an applicant's credibility. Under judicial review, this Court does not intervene in findings of fact reached by the Board unless it is demonstrated that its conclusions are unreasonable or capricious, made in bad faith or not supported by the evidence. (*Aguebor v. (Canada) Minister of Employment and Immigration* (F.C.A.), [1993] F.C.J. No. 732 (QL), at paragraph 4); (*Wen v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 907 (QL), at paragraph 2); *Giron v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 481 (QL); *He v. Canada* (*Minister of Employment and Immigration*), [1994] F.C.J. No. 1107 (QL); *Khan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 839, [2006] F.C.J. No. 1064 (QL), at paragraph 27.)

ANALYSIS

(1) Did the Board err in its finding on state protection?

[17] The Applicants argue that the Board erred in its determination of the objective basis of their refugee claims, more specifically, in the assessment of the issue of state protection.

[18] It is to be noted that, in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at paragraphs 49, 50 and 52, the Supreme Court of Canada determined that the state is presumed to be capable of protecting its citizens in the absence of a complete breakdown of the state. The danger that this presumption will operate too broadly is tempered by a requirement that clear and convincing proof of a state's inability to protect must be brought forward. An applicant might advance testimony of similarly situated individuals unassisted by state protection or the applicant's testimony of past personal incidents in which state protection did not materialize or the applicant's personal experience as proof of a state's inability to protect its citizens. An applicant can also provide country condition documentation to rebut the presumption that a state is capable of protecting its citizens. (Reference is also made to *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, [2006] F.C.J. No. 439 (QL), at paragraphs 27 to 32.)

[19] Moreover, in *Xue v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1728, Justice Marshall E. Rothstein held that it was not erroneous to conclude that "clear and convincing" confirmation required a higher standard of proof than the bottom end of the broad category of a "balance of probabilities." Specifically, he stated the following:

> [12] Having regard to the approach expressed by Dickson C.J.C. in *Oakes*, i.e. that in some circumstances a higher degree of probability is required, and the requirement in *Ward* that evidence of a state's inability to protect must be clear and convincing, I do not think that it can be said that the Board erred in its appreciation of the standard of proof in this case. If the Board approached the matter by requiring that it be convinced beyond any doubt (absolutely), or even beyond any reasonable doubt (the criminal standard), it would have erred. However, the Board's words must be read in the context of the passage in Ward to which it was referring. Although, of course, the Board does not make reference to *Oakes* or *Bater*, and while it would have been more precise for the Board to say that it must be convinced within the preponderance of probability category, it seems clear that what the Board was doing was imposing on the applicant, for purposes of rebutting the presumption of state

> protection, the burden of a higher degree of probability commensurate with the clear and convincing requirement of Ward. In doing so, I cannot say that the Board erred.

[20] In its decision, the Board concluded that the Applicants failed to rebut the presumption of state protection. The Board relied on extensive documentary evidence that indicates that the El Salvadorian government is taking an active role in combating the problem of gang-related violence (Decision of the Board, at pages 4-10). In its decision, the Board agreed that gang related violence does take place in El Salvador, but noted that this did not necessarily lead to an objective basis for the Applicants' claims. (Decision of the Board, at page 5). Moreover, the Board determined that state protection is available to the Applicants, noting that El Salvador is a constitutional, multiparty democracy that respects human rights, appears able and willing to offer protection to its nationals, is in effective control of its territory, and has its own military and civil authorities (Decision of the Board, at page 6). Finally, the Board determined that the Applicants failed to show that they had made reasonable efforts to seek protection, which was not forthcoming or adequate.

[21] Consequently, the Board did not make an unreasonable error in its findings on state protection in El Salvador.

(2) Did the Board err in ignoring evidence?

[22] Contrary to the Applicants' allegations, in light of the Board's decision and the transcript, it appears that the Board did consider and weigh the proportionality of the evidence before it.

[23] It is well established that the Board is assumed to have weighed and considered all of the evidence unless the contrary is shown. Hence, the Court has also ruled on numerous occasions that it is also within the Board's discretion to exclude evidence that is not material to the case before it. The Board's decision, not to admit evidence submitted before it or to refer to each and every piece of evidence, does not amount to a reviewable error. (*Yushchuk v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1324 (QL), at paragraph 17.)

[24] In fact, the Board has great flexibility in terms of the evidence that it may consider. It is not bound by any legal or technical rules of evidence and may rely on any evidence it considers credible or trustworthy in the circumstances. (IRPA, subsection 173(*c*) and (*d*); *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 349, [2004] F.C.J. No. 395 (QL), at paragraph 7.)

[25] The Applicants' contentions, that the Board's conclusions were not based upon the facts of the case and that it ignored the Applicants' documentary evidence that they were threatened by members of the gang not to go to the police out of fear of these threats, are not well founded. Albeit, the Board noted in its decision that the principal Applicant simply did not bother to approach the Salvadorian authorities after allegedly receiving **a note on his truck**, it is clear that the Board properly understood the facts of the case, despite the fact that there is no mention of such a note in the principal Applicant's PIF. (Decision of the Board, at pages 1-2; Transcript of the hearing, at pages 4-7.)

[26] Furthermore, contrary to the Applicants' allegations, the Board based its decision on reliable documentary sources. (Decision of the Board, at pages 8-9; Transcript of the hearing, at pages 9-10.) The general documentary evidence submitted by the Applicants indicating that there are problems with the protection regime for victims of gang violence is of no bearing since the Board recognized that there were gang violence issues in El Salvador.

[27] Nonetheless, in considering the Applicants' particular circumstances, the Board concluded that they failed to demonstrate, with clear and convincing evidence, that they would not be able to obtain state protection especially since the police did respond in this particular case; however, the principal Applicant chose not to take advantage of such state protection.

[28] The onus was on the Applicants to provide clear and convincing evidence to show that state protection would be unavailable. The existence of documents suggesting that the situation in El Salvador is not perfect, is not, by itself, clear and convincing confirmation that state protection is unavailable, especially when there are numerous other documents indicating that state protection is available. As stated in *Pehtereva v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1491 (QL):

> [12] In addition, I am not persuaded that the tribunal ignored documentary evidence provided by the applicant. That evidence, of newspaper and other articles with translations to English where necessary, is not specifically referred to by the tribunal, but in its decision it recorded its agreement with the Refugee Hearing Officer's observations that the most reliable evidence was from independent objective sources such as Human Rights Watch, Amnesty International and the Department of State Country Reports as opposed to anecdotal, newspaper articles. The sources referred to by the tribunal are sources regularly relied upon by refugee claims tribunals as providing generally objective information on country conditions. Reliance upon such sources cannot be characterized as error; even if the newspaper articles submitted by the applicant

> provided examples indirectly supportive of the applicant's claim, for it is trite law that the weight to be assigned to given documents or other evidence is a matter for the tribunal concerned. Even if the reviewing court might have assigned different weight or reached other conclusions that provides no basis for the reviewing court to intervene where it is not established that the tribunal has been perverse or capricious or its conclusions are not reasonably supported by the evidence. I am not persuaded that the tribunal's conclusions can be so classified in this case.
>
> [13] Finally, the tribunal's decision does not set out in precise terms why it preferred certain documentary evidence and not other evidence, but that does not constitute error. Here, the applicant's concern is primarily that the documentary and other evidence offered by the RHO was relied upon without specifying why evidence of the applicant was not. But that preference of the tribunal, related to evidence of the general circumstances within Estonia, of which the applicant's experience was but an example. The general circumstances based on documentary evidence from recognized sources provided the basis for objectively assessing the applicant's expressed fear. In my opinion, the tribunal did not err by ignoring evidence offered by the applicant, or by failing to specify reasons for preferring other sources of evidence, particularly in seeking an objective overview of circumstances within Estonia. Nor am I persuaded that the tribunal misunderstood or misstated the evidence of the applicant in any way significant for its ultimate finding that the applicant is not a Convention refugee, because it found no serious possibility or reasonable chance she would be persecuted for any reason set out in the definition of Convention refugee should she return to Estonia.

[29] The Court finds that the Board did properly assess the objective basis of the Applicants' claim. Consequently, no error is found on this basis.

(3) Did the Board err in its credibility finding?

[30] The Applicants argue that the Board erred in its credibility finding. The Court disagrees, finding instead that the Board was justified in arriving at such a conclusion and provided clear reasons for its determination.

[31] First, the Board noted significant contradictions and inconsistencies between the principal Applicant's PIF narrative and his testimony:

> Throughout his testimony, the principal claimant statements were muddled and riddled with inconsistencies. While attempting to ascertain his reaction to situations he had described as representing eminent harm, the principal claimant was asked about his day-to-day life following the alleged incident. According to his PIF narrative, the principal claimant has stated that, shortly following the incident, he and his family fled to a cousin's house in San Salvador where they remained until mid-April. However, as his PIF indicated that he worked uninterrupted as a sales clerk from February 02, 2004 until June 16, 2005, he was asked when he stopped work. The principal claimant responded that he stopped working as of March 13, 2005 when he fled to San Salvador to avoid complying with the police summons. He then changed that testimony when it was pointed out that his PIF told the Board that he stopped working on June 16, 2005. June 16, 2005 was, con-incidentally the date on which the claimants departed El Salvador. After repeated questions intend on simply establishing his final day of work, the principal claimant then stated that both March 13, 2005 and June 16, 2005 were correct
>
> The principal claimant had already testified that from March 13, 2005 until April 14, 2005, he was in hiding at a cousin's home in San Salvador and, thereafter, from April 14, 2005 until the time he left El Salvador, he hid with an aunt in San Salvador where arrangements were made to assure that he would not have to "leave" his "room for anything".
>
> Finally, after a number of similar internal contradictions, counsel was asked if he preferred to continue putting questions to his client and, therein creating more contradictory testimony, or, instead to proceed directly with his submissions. Counsel chose to then stop questions and present oral submissions on behalf of his clients.

(Decision of the Board, at pages 10-12; Transcript of the hearing, at pages 12-15; PIF (Principal Applicant, at page 45.)

[32] Second, the Board found that the Applicants did not provide a satisfactory explanation for the delay in applying for refugee status in Canada. The Board noted:

> Genuine Convention refugees can be expected to seek out protection as soon as it is reasonably practicable and they are beyond the reach of their oppressors. Once

> having obtained protection against *refoulement*, they are then free to apply to resettle in any third country they so choose. At this point, however, the matter belongs in the realm of immigration law, and not refugee law (Hankali, Ilie, and Bains)
>
> The claimants admit that illegally entered the USA and remained there for over three weeks and, after being apprehended by USA immigration made no mention of their alleged fear of return to El Salvador. At no time did they make a claim for refugee protection in the USA and, instead chose to simply ignore an opportunity to appear in USA courts and explain their situation…

[33] The cases as outlined by the Board must be distinguished from decisions pertaining to delays of application of refugee protection in Canada as raised by the Respondents; nonetheless, the fact that the Applicants did not seek protection, as soon as they had fled El Salvador, is a factor that should have been and was considered by the Board.

[34] The Court finds that the Board did properly assess the subjective basis of the Applicants' claim. Consequently, no error is found on this basis.

CONCLUSION

[35] For all the above reasons, the applicatiion for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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