Date: 20070705

Docket: IMM-4525-06

Citation: 2007 FC 706

Ottawa, Ontario, July 5, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ALBERTO CARLOS DOS SANTOS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] The presumption that testimony is truthful is predicated on an absence of reason to doubt its truthfulness.

In this case, numerous reasons provided by the Immigration and Refugee Board demonstrate doubt with respect to the truthfulness of the applicant's evidence.

The behaviour of the applicant in failing to claim refugee protection in the United States (U.S.), after a period of over one year and a return to the U.S. after having been deported (without still having made a claim), is not in the Applicant's favour. Subsequent to an apprehension for a

traffic violation after a fifteen month stay without having made a claim for refugee protection, the Applicant finally applied for refugee status.

The Board reasonably concluded that the applicant's behaviour coupled with the internal inconsistencies to his testimony undermined his credibility as well as the subjective basis for his fear of persecution. (*Bogus v. Canada (Minister of Employment and Immigration)* (1993), 71 F.T.R. 260 (F.C.T.D.) at 262, aff'd F.C.A. (A-712-93) September 26, 1996.)

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 April 5, 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 Applicant, Mr. Alberto Carlos Dos Santos, is a citizen of Brazil, who claims to have a well-founded fear of persecution at the hands of drug dealers who allegedly murdered his brother and sexually assaulted and wounded his common-law wife.

[4] Mr. Dos Santos claims that his brother was murdered by drug dealers in August 1997.

[5] From 1997 to 1999, the Applicant alleges there was surveillance in front of his house. He also received threatening notes and anonymous calls.

[6] In October 1999, Mr. Dos Santos went to Israel for a “cooling off” period. He returned to Brazil in July 2000.

[7] The following day, the Applicant alleges that his common-law wife was sexually assaulted, shot, and hospitalized for two months. He claims that she recognized the assailant as being part of the same drug trafficking gang that killed Mr. Dos Santos’ brother.

[8] In October 2002, the Applicant went to the U.S. He did not make a claim for refugee protection. As a result, he was deported back to Brazil in February 2003.

[9] After living in Brazil for eight months, he returned to the U.S., where he resided for seven months before entering Canada in May 2004. The Applicant filed a claim for refugee protection in August 2006, fifteen months following his arrival.

DECISION UNDER REVIEW

[10] In its decision rendered on April 5, 2006, the Board found the determinative issues to be the Applicant’s lack of credibility, nexus, delay in making a claim, failure to claim in the U.S., state protection, and internal flight alternative. The Board further noted that, although delay is not in itself

a decisive factor, it is a relevant and potentially important consideration, where the Applicant delayed in making a claim upon his arrival in Canada.

[11] The Board determined that the Applicant was neither a Convention refugee, nor a person in need of protection because he was not credible or trustworthy, and because adequate state protection is available to the Applicant in Brazil.

ISSUES

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

(2) Did the Board reject uncontradicted evidence?

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, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être 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 treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements 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	(ii) elle y est exposée en tout lieu de ce pays alors

every part of that country and is not faced generally by other individuals in or from that country,	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. As such, in what concerns 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 Applicant submits that the Board erred in its state protection analysis by improperly canvassing the effectiveness of the state protection available in Brazil.

[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 advanced. A claimant might advance testimony of similarly situated individuals unassisted by state protection or the claimant's testimony

of past personal incidents in which state protection did not materialize or the claimant's personal experience as proof of a state's inability to protect its citizens. A claimant 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] The Board's analysis of state protection in Brazil is thorough. The Board considered the Applicant's efforts to secure protection in Brazil and the State's response:

(a) When the Applicant and his family had called the police to complain about neighbors selling drugs, the police patrolled the area more frequently;

(b) The increased patrols affected the drug business in the area and angered the drug dealers;

(c) Following the sexual assault of the Applicant's common-law wife, the police took a report and started the criminal investigation; and,

(d) The Applicant was advised through an anonymous call that the perpetrators did not want the police involved because "they [the police] would go after them and punish them."

(Decision of the Board, pages 6-7.)

[21] On the basis of the above, the Board properly found that there was evidence of effective state protection in Brazil.

[22] The Board considered the documentary evidence of country conditions and noted the implementation of a National Security Plan in Brazil which included changes to gun control, witness protection and the promotion of police professionalism and accountability. The analysis also considered that, while crime is prevalent, the increased police presence in certain places led to a decrease in the incidence of crime. (Decision of the Board, pages 7-8.)

[23] Consequently, the Board's analysis of state protection in Brazil was sufficient and properly addressed the issue of effectiveness of such protection.

(2) Did the Board reject uncontradicted evidence?

[24] Mr. Dos Santos submits that the Board rejected his uncontradicted evidence regarding the identity of those responsible for his brother's death without having found the Applicant lacking in credibility.

[25] 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.)

[26] 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.)

[27] That being said, in his Personal Information Form (PIF) and his affidavit, the Applicant stated that he believed his brother was murdered by drug dealers. His testimony, however, was as follows:

> PRESIDING MEMBER: …. Who killed him?
>
> CLAIMANT: Who killed him exactly I don't know. But, they were people linked to the drug trafficking.
>
> PRESIDING MEMBER: How do you know that?
>
> CLAIMANT: Because according to the neighbours and according to the witness on that day, my brother had a fight, a physical fight with the bandits.
> …
>
> PRESIDING MEMBER: But, they are thieves? These bandits are thieves?

> CLAIMANT: Yes.
>
> PRESIDING MEMBER: So, what has that got to do with drug traffickers?
>
> CLAIMANT: The bandits, they have everything to do with the drug trafficking.
>
> …
>
> CLAIMANT: I believe that perhaps he had used drugs. Perhaps – I don't know, it is something that hasn't been clarified up to now. Perhaps to rob him, because he had a good occupation, and not with a lot of money, but with a good amount of money, he had a good life.

[28] Having reviewed the evidence, the Board found that the Applicant had not established a link between the bandits who may have killed his brother and the drug dealers allegedly feared by him nine years later. The Board concluded that:

> This, in the panel's view is pure speculation and the claimant failed to adduce any credible evidence corroborating that the drug dealers executed the death of brother (sic). The panel did not find his testimony to be credible.

(Decision of the Board, page 3.)

This is distinguishable from those cases cited by the Applicant in which the Board made no adverse finding regarding an Applicant's credibility and yet rejected the evidence submitted before it.

[29] The Board made a clear finding that the Applicant was not credible on this issue. This finding was amply supported given that Mr. Dos Santos did not provide evidence supporting his belief that the bandits who killed his brother were tied to the drug dealers he feared.

[30] In addition to the above findings, the Board made additional findings that support its decision. Specifically, the Board noted the following:

(a) In the two years during which the Applicant alleged he was watched, received phone calls and threatening notes, he was never harmed even though the alleged perpetrators had ample opportunity; and,

(b) His siblings continued to live in Brazil and were never subject to the same harassment.

(Decision of the Board, pages 3-4.)

[31] The Board consequently concluded that "…the claimant never established a valid or credible reason why he should be targeted personally." (Decision of the Board, page 3.)

[32] Furthermore, while the Applicant suggests that the Board misconstrued his evidence regarding his travels outside Brazil, no suggestion was made by the Board that he should have stayed in Israel.

[33] The evidence before the Board was that the Applicant:

(a) Having fled Brazil, returned two times (for over 2 years that first time and 7 months the second time);

(b) Made two trips to the U.S. (for 4 months and over a year respectively) and did not make a claim for asylum either time; and,

(c) Came to Canada and waited for fifteen months to make a claim for refugee status.

(Decision of the Board, pages 3-5.)

[34] Moreover, when asked why he failed to claim refugee protection in the U.S., the Applicant offered no explanation. While a delay in claiming is not a determinative factor, it is one that can be considered. The Board therefore did not err in concluding that "his action, rather than inaction, is not consistent with the actions of a person with a well-founded fear of persecution." (*Mughal v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1557, [2006] F.C.J. No. 1952 (QL) at paragraphs 33-36; Decision of the Board, page 5.)

[35] On a similar note, the Board did not err in considering Mr. Dos Santos' fifteen month delay in applying for refugee protection in Canada. Delay in claiming refugee status both in failing to leave one's country and in failing to claim at the earliest opportunity, is a factor which the Board is entitled to consider as affecting the credibility of a claim and undermining the Applicant's subjective fear. (*Huerta v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 271 (QL).)

[36] Consequently, the Court finds that the Board did properly assess the objective and subjective facets of the Applicant's claim. Thus, no error is found on this basis.

CONCLUSION

[37] For all the above reasons, the application 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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