Date: 20071002

Docket: IMM-4693-06

Citation: 2007 FC 994

Ottawa, Ontario, October 2, 2007

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

MANUEL MARIA CODAS MARTIN
MARCOS MANUEL CODAS ECHAVARRI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated August 3, 2006. The Board concluded that the applicant is excluded from refugee protection pursuant to Article 1F(b) of the Refugee Convention. The Board found that the applicant was not credible and as such that the Minister met its burden and established the exclusion.

ISSUES

[2] The applicant raises four issues to be considered by the Court:

a) Did the Board err in its assessment of credibility?

b) Did the Board err in its assessment of the principal Applicant's lack of subjective fear?

c) Did the Board err it its plausibility assessment?

d) Did the Board err in its assessment of corroborating evidence?

[3] I would simply restate the question as follows: did the Board err by making adverse findings of credibility in a perverse and capricious manner, on irrelevant considerations, or without regard to the totality of the evidence before it?

BACKGROUND

[4] The principal applicant, Manuel Maria Codas Martin, is a citizen of Paraguay. The second applicant is his son, Marcos Manuel Codas Echavarri, also a citizen of Paraguay, who bases his claim on the same set of facts as his father. The principal applicant was a practicing physician and the mayor of Coronel Bogado, a Paraguayan town, between December 2001 and January 2003. He was elected as a member of the dominant Colorado party, but was in fact a member of a minority faction and ran for mayor as an independent. He refused to ally himself with the official faction of the Colorado party, because certain key members had connections with and received campaign funding from drug traffickers in the region.

[5] As mayor, the applicant alleges that he adopted measures to impede the traffic of narcotics; he had key roads rendered unusable and increased surveillance of vehicles operating without licence plates. Around August of 2002, he began receiving death threats from people who wished him to reverse these measures.

[6] According to the applicants, the second applicant was kidnapped on December 15th, 2002. The kidnappers had the second applicant telephone his father. They demanded cheques in the amount of $100 000 U.S., and ordered that the principal applicant not tell anyone of the kidnapping. They further ordered that the principal applicant publicly manifest his support for the official party and reopen roads used by the traffickers within 48 hours. They threatened to assassinate both the principal applicant and his son, if he failed to comply with their demands.

[7] The principal applicant signed the cheques, and the second applicant was returned to his father the following morning. He had dried blood on his face and clothes, bruises and an open cut. The principal applicant took his son to the doctor to be examined for internal injuries.

[8] On December 20, 2002, an order was rendered by the civil court garnishing 25 percent of the applicant's mayoral wages on the ground that the cheques dated December 15, 2002 had insufficient funds. A lien was put on the applicant's property, and his bank accounts were closed.

[9] On December 25, 2002, as he was returning from the town of Encarnacion, a passing vehicle fired three shots at the principal applicant, and hit his car.

[10] Finally, on January 15, 2003 at 10 p.m., the applicant received an emergency call to see a patient. As he parked in front of the house supposedly belonging to the patient, a masked person approached his vehicle, pointed a gun at his head, and threatened him with death if he did not leave the country. Following this incident, the principal applicant and his son requested a visa to Canada on January 22, 2003, and travelled to Canada via Argentina between February 1 and 3, 2003.

DECISION UNDER REVIEW

[11] The Board rendered its decision following hearings on three separate dates. The Minister of Citizenship and Immigration intervened for an exclusion under Article 1F(b) of the Refugee Convention.

[12] The Board concluded that the Minister's representative established serious reasons for considering that the principal applicant was excluded from the Convention refugee definition and from being a person in need of protection. The Board's determination essentially turned on whether the principal applicant left Paraguay due to fear of persecution or whether he left to avoid criminal proceedings.

[13] The Board preferred the Minister's submission and accepted that the following legal documents establish that the applicant was convicted of fraud, rather than being a victim of persecution, pursuant to sections 96 or 97 of the Act:

a) A demand of payment and judicial seizure order in the amount of approximately $30,000 U.S., dated December 27, 2002, payable to the court on behalf of one Patricio Jose Acosto Rivero, stating that a failure to comply would result in a lien on the applicant's property;

b) A Public Ministry Judicial Power Order and Arrest Warrant dated February 4, 2003, ordering the detention of the applicant. The document states that the principal applicant issued cheques for approximately $60,000 U.S. to Patricio Acosto in October of 2002, and that following an investigation into the matter, the principal applicant's bank accounts were closed on December 10 and 11, 2002;

c) Two Paraguayan newspaper articles dated March 11 and 23, 2003 respectively. The first states that the principal applicant fled to Canada in order to evade his debts and the warrant issued for his arrest. The second refers to a public auction of the principal applicant's goods, seized by Patricio Acosta;

d) A preventative lien order demanding payment of approximately $8,000 U.S., dated March 19, 2003;

e) A Certificate of Notification issued by the judiciary of the Republic of Paraguay stating that the principal applicant is in contempt of the law;

f) Correspondence from INTERPOL indicating that there is a national arrest warrant outstanding against the principal applicant.

[14] The Board found there was a lack of sufficient credible evidence to accept the applicants' allegations for the following reasons:

a) The principal applicant did not report the December 15 kidnapping to the police, despite the fact that he made two written police reports regarding vandalism to his car, and the attempt on his life on December 25, 2002. The Board did not accept the principal applicant's explanation that the kidnappers threatened to kill him if he reported them to the police, because their demand of silence was the only one with which he complied. The Board concluded it was more plausible that the applicant would have reported the kidnappers if he had a genuine fear. Further, it was found to be implausible that the principal applicant would report the incident of December 25, but not the kidnapping.

b) The Board drew a negative inference from the fact that the applicant did not specifically mention in his Personal Information Form (PIF) the kidnappers' demand that he not go to the police.

c) The Board did not accept that the principal applicant was threatened in January; the Board found it implausible that the applicant would decide to leave the country on the basis of a threat which was deemed to be no more serious that the attack of December 25, and therefore concluded that the incident did not occur.

d) The Board found that the principal applicant's behaviour was not what one would expect from a person who feared being killed; despite the fact that he claimed to be in hiding from December 15 until the time he left, the principal applicant continued to practice medicine and worked actively as mayor.

e) The Board found it implausible that the principal applicant did not go to the banks from which the cheques were drawn, and advise them of the problem with the

accounts between the time he issued the cheques to the kidnappers on December 16, 2002 and December 20, 2002 when the judicial action was allegedly commenced. This inference supported the Board's conclusion that the kidnapping and signing of cheques under duress did not happen.

f) The Board found it implausible that a garnishment order would be issued in the short time span between the kidnapping and December 20. Rather, the Board concluded that the document more likely resulted from an ongoing proceeding, brought prior to the kidnapping.

g) The Board found it was not plausible that the principal applicant would seek the assistance of a lawyer, and yet fail to divulge the kidnapping. He simply told the lawyer that he was not able to comply with large sums payable by cheque, and as such his accounts had been closed.

h) The Board attributed minimal weight to a letter provided by the principal applicant's lawyer. Because the Board did not accept that the accounts were closed due to the kidnapping, it was concluded that the information provided by the principal applicant was not credible, and as such the letter was not based on credible information.

i) The Board attributed no weight to a doctor's note dated December 16, 2002, stating that the second applicant sought medical treatment after the kidnapping. Because the same physician sent a letter of support on behalf of the refugee claim, the Board doubted whether the physician was an independent and objective source.

j) The Board attributed no weight to letters sent by the applicants' friends, finding them to be self serving.

k) The Board gave no weight to the evidence of procedural irregularities in violation of Paraguayan law, notably the fact that the arrest warrant appeared to have been issued by a prosecutor and not a judge.

l) Finally the Board gave no weight to the psychological report stating that the second applicant suffers from post traumatic stress disorder as a result of the kidnapping. Because it disbelieved the occurrence of the kidnapping, it did not accept the diagnosis of the psychologist.

[15] The Board accepted the documentation disclosed by the Minister as valid and trustworthy, and therefore concluded that there were serious reasons to believe that the principal applicant was guilty of serious non-political crimes outside of Canada. The Board stated that because serious criminality can include economic crimes, and because fraud over $5,000 is punishable in Canada by a maximum of ten years, pursuant to section 380 of the *Criminal Code of Canada*, R.S., 1985, c. C-46, the applicant was excluded.

RELEVANT LEGISLATION

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Convention refugee	Définition de « réfugié »
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 persécutée du

religion, nationality, membership in a particular social group or political opinion,

(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

(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.

fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

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) 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.

Person in need of protection

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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or,

Personne à protéger

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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne

because of that risk, unwilling to avail themself of the protection of that country,	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.
Person in need of protection	Personne à protéger
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.
Exclusion — Refugee Convention	Exclusion par application de la Convention sur les réfugiés
98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	**98.** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

Criminal Code of Canada, R.S., 1985, c. C-46

Fraud	Fraude
380. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,	**380.** (1) Quiconque, par supercherie, mensonge ou autre moyen dolosif, constituant ou non un faux semblant au sens de la présente loi, frustre le public ou toute personne, déterminée ou non, de quelque bien, service, argent ou valeur :
(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or	a) est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans, si l'objet de l'infraction est un titre testamentaire ou si la valeur de l'objet de l'infraction dépasse cinq mille dollars;
(b) is guilty	b) est coupable :
(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or	(i) soit d’un acte criminel et passible d’un emprisonnement maximal de deux ans,
(ii) of an offence punishable on summary conviction,	(ii) soit d’une infraction punissable sur déclaration de culpabilité par procédure sommaire,
where the value of the subject-matter of the offence does not exceed five thousand dollars.	si la valeur de l’objet de l’infraction ne dépasse pas cinq mille dollars.

United Nations Convention Relating to the Status of Refugees, T.S. 1969

Article 1. Definition of the term "refugee"

> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that.
>
> > (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

ANALYSIS

Preliminary Issues

[16] The respondent raises two preliminary issues.

[17] First, the respondent raises the failure of the applicants to file their own affidavits based on personal knowledge in support of their application for leave; instead the affidavit filed was signed by counsel's assistant, Sijani Widyaratne. The respondent cites Justice McGillis' order denying leave in *Morales et al v. Canada (Minister of Citizenship and Immigration)*, (September 3, 1998) IMM-1582-98 (F.C.T.D.) in support of the position that this failure is fatal to the application, and it cannot be remedied by a third party affidavit. In *Sarmis v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 110, [2004] F.C.J. No. 109 (QL), I ruled on the same question and found at para. 10:

> It is well-established that the use of third party affidavits is not fatal to an application for judicial review. Though I do not applaud the use of third person affidavits, I am not prepared to dismiss the application for judicial review on this basis. As the affidavit of Rizni Faruk is based on personal knowledge of the applicants' testimony at the hearing, it is sufficient to support this application.

[18] In the present case, I do not find that the use of a third party affidavit by the applicants is fatal to the application.

[19] Second, the respondent raises the fact that only the transcript of the first sitting of the applicants' refugee claim is produced in the applicant's record. The respondent argues that this gives an incomplete picture of the evidence. The applicant's record, in accordance with Rule 10 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, contains all required documents. The record of the Board is before the Court in accordance with the order of Justice Blanchard, dated June 28, 2007, and as such the Court has access to the evidence in its totality.

Standard of Review

[20] Two standards of review are applicable in the present case (*Chowdhury v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 139, [2006] F.C.J. No. 187 (QL) at paras. 11-13).

[21] It is accepted that the standard of review in the assessment of credibility is patent unreasonableness (*Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (F.C.A.) (QL), at para. 4). Plausibility findings such as those impugned in the present decision relate to the credibility of the evidence before the Board. In *Aguebor*, above, the Court clearly stated that plausibility findings are owed the same deference as other credibility-based conclusions; they may only be reviewed by the Court if they are made in a perverse or capricious manner, based on irrelevant considerations or without regard to the totality of the evidence. The Court held in *Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, [2001]

F.C.J. No. 1131 (QL), at para. 6 that these findings will be patently unreasonable when they 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".

[22] Whether the Applicant is excluded under section F of the Convention is a mixed question of fact and law and as such the standard of reasonableness *simpliciter* should apply.

[23] I find no reviewable errors in the case at bar. The Board explained very well why it did not believe the principal applicant. It could not cope with the fact that the applicant did not go to the police to report the kidnapping of his son while he communicated with them at least 15 times on other matters. The Board could also not understand why the applicant did not talk to his bank while he knew that he had insufficient funds for the $100,000 US cheques he had signed. Also of concern was the fact that he did not reveal the whole story to his lawyer. Finally, the Board gave cogent reasons to explain why it could not accept the applicant's behaviour as one who feared being killed. It must be noted that the principal applicant continued to work as a mayor and at his private clinic on a daily basis for approximately six weeks after the alleged kidnapping.

[24] The principal applicant's son argues that the Board failed to assess his claim. I do not agree. The son's claim is wholly based on that of his father. Since the principal applicant's story was not believed, the findings pertain to both claimants. It was also not patently unreasonable for the Board to give no weight to the doctor's note dated December 16, 2002 to corroborate the fact that the second claimant sought medical treatment after the alleged kidnapping because the Board did not

believe that such kidnapping had occurred (*Kabedi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 154, [2005] F.C.J. No 224 (QL)).

[25] Finally, the Court considers that its intervention is not warranted towards the Board's analysis on the exclusion under Article 1F(b) of the Convention. It was not unreasonable for the Board to accept as valid and trustworthy the documentation disclosed by the Minister.

[26] At the end of the hearing, counsel for the applicants referred the Court to the notice of the decision they received where it showed that both applicants are excluded under Article 1F(b) of the Convention. This is a clerical error because a reading of the conclusion of the decision makes it clear that the exclusion refers only to the principal applicant and not his son.

[27] No questions for certification were proposed and none arise.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4693-06
STYLE OF CAUSE:	**MANUEL MARIA CODAS MARTIN MARCOS MANUEL CODAS ECHAVARRI and THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
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