Date: 20030331

Docket: IMM-1830-02

Citation: 2003 FCT 376

Ottawa, Ontario, this 31st day of March, 2003

PRESENT: THE HONOURABLE MR. JUSTICE BLANCHARD

BETWEEN:

CDE

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED REASONS FOR ORDER AND ORDER

[1] The applicant, CDE, seeks judicial review of the April 4, 2002 decision of the Convention Refugee Determination Division of the Immigration and Refugee Board (the "Board"). The Board determined that the applicant was not a Convention refugee.

FACTS

[2] The applicant is a citizen of Colombia. The applicant, a university graduate with a degree in business administration, began to work for a company in Medellin known as"X". She was hired

as the director of the human resources department. She alleges that on August 8, 2000, she received an envelope marked “Personal” from the People’s Armed Commandoes (in Spanish, *Comandos Armados del Pueblo*, or “CAP”). The group describes itself as being associated with the Bolivarian Militia Movement, and as working toward the interests of the less favoured classes.

[3] In the letter, the group directed the applicant to do three things. She was told not to fire workers, to give the group twenty per cent of her salary each month, and not to report the letter or its demands to the authorities. She was warned that if she were to go to the authorities, the group would take action that the applicant would regret.

[4] The applicant was aware that death threats had been made to company officials, in light of the situation at the company and that of the country. She has discovered this while looking at correspondence between management and the predecessor of her position. She had discussed the letter with her father but with no one else. Despite the letter, the applicant dismissed two employees at the request of management, apparently for unsatisfactory performance.

[5] On the evening of August 11, 2000, the applicant was approached by two men, one of whom pointed a gun at her and addressed her with insults and obscenities. This man expressed his displeasure that the group’s direction not to fire workers had been ignored. On August 14, the applicant submitted her resignation without explanation. The next day, the applicant received additional threats by telephone. The group had apparently been made aware of her resignation. On August 17, she received another call, ordering her to return to her job by August 28.

[6] The applicant left Medellin and went to the farm of a friend outside the city until she left Colombia on September 18, 2000. She had been in possession of a U.S. visa for approximately one and one-half years, and decided to use it to travel to New York. From September 18 to December 3, 2000, the applicant was in the U.S. and occasionally kept in touch with her father. He informed her that additional threatening calls had been made. On December 3, 2000, the applicant entered Canada at Niagara Falls, Ontario, and made her refugee claim at that point of entry upon arrival. The applicant resided briefly in Toronto before moving to Vancouver.

[7] The applicant states in her Personal Information Form ("PIF") that she did not seek protection from authorities in Colombia out of fear that the armed militia, with its network of contacts, would find out that she had gone to the police and exact retaliation for having done so. She also claimed that she did not think about claiming refugee protection anywhere until she was told, during her stay in New York, that Canada is a signatory to the Convention on Refugee Protection and could provide her with safety and protection.

DECISION OF THE BOARD

[8] The Board, sitting as a panel of two members, determined that the applicant was not a Convention refugee. The Board decided that the evidence of the applicant was not credible and that, apart from the credibility issue, the applicant failed to seek the protection of the state. Such protection was reasonably available to her in Colombia.

[9] The Board noted several elements of the applicant's narrative which it found implausible. It did not believe her statement that she did not feel that there was anyone at the company that she could trust, given that her appointment to a senior position at the company reflected that company's trust in her. The Board also found not to be reasonable her explanations for not telling anyone else at the company, including management and security personnel, about the threats that had been made to her or about the correspondence to the person who had previously occupied her position.

[10] The decision of the applicant to continue working notwithstanding the advice of her father, a former police officer, not to return to the job was also found to be difficult to accept in light of the danger in which she claimed to be. She did not present the letter expressing these threats when she submitted documents in support of her refugee claim upon entering Canada, but did make available other, less significant documents. For these reasons, the panel gave little weight to the letter in which the threats allegedly had been expressed.

[11] The panel also stated in its assessment of credibility that the demeanour of the applicant during testimony was not consistent with the emotions that would have been expected of someone describing such events. At page 5 of its reasons, the Board noted:

> In assessing credibility, the panel also noted the claimant's demeanour while she was testifying. At no time during the hearing did she express the sort of emotions that would have reasonably been expected had she related events that actually happened to her. Instead, she seemed to have a rather remote and indifferent manner while she was testifying about traumatic events, as if she was reciting a memorized script.

[12] The Board went on to consider other aspects of the evidence of the applicant and also found these elements to be lacking in credibility. The Board refers to a letter that was prepared by the company which simply confirmed that the applicant worked there in August 2000. The Board opined that the applicant ought to have contacted the company to follow up on whether any other employee, especially the successor to her position, received similar threats. Her failure to do so was not explained to the satisfaction of the Board, and her explanation as to why she let two workers go after being told not to fire anyone also failed to satisfy the Board.

[13] The incident in which a gun was pointed at her after she left her office was not reported to the company or to any state authority. This raised doubt both regarding the truthfulness of the account of this attack and with respect to the claim of inadequate state protection. The delay of the applicant in leaving Colombia and her failure to claim refugee protection while in the U. S. also raised doubts about her subjective fear of persecution and the credibility of her allegations.

ISSUES

[14] The issues, as framed by the parties, are the following:

1. Did the Board base its decision on findings of fact that were erroneous or made without regard to the evidence?

2. Did the Board err in law in finding that state protection was available to the applicant?

ANALYSIS

Credibility

[15] The standard of review for findings of fact made by the Board is that of patent unreasonableness. Normally, findings of the Board with respect to credibility will not be disturbed if they are supported by reasons made in clear and unmistakable terms: *Hilo* v. *Canada (Minister of Citizenship and Immigration)* (1991), 15 Imm. L.R. (2d) 199. However, even when the Board does give reasons for its findings of credibility, those reasons must be supported by the evidence that was before the Board. Where the Board has made a decision without regard to the evidence before it, or has based its decision on irrelevant or extraneous considerations, that decision warrants intervention by this Court: paragraph 18.1(4)(*d*) of the *Federal Court Act*, R.S.C. 1985, c. F-7.

[16] The Board found inconsistencies in the evidence of the applicant. Her testimony was found to be both internally inconsistent and inconsistent with other evidence. In addition, the Board found the applicant not to be credible because her version of events was found to be implausible.

[17] In determining the credibility of an applicant, a panel must take care to ensure that all of the evidence, including documentary evidence, is thoroughly and carefully considered. In her testimony, the applicant demonstrated an acute awareness of the conditions of her country. She was aware that armed commando groups penetrate every aspect of daily life in Colombia, including office relations and such basic public services as local police forces. Her decision not to tell anyone about the threatening letter, including company management, was reasonable: she was petrified with fear. In

particular, she feared that she might become one of the many civilians who, according to the documentary evidence, have been killed by militia groups.

[18] The Board suggested that the company hired her out of a belief that it had sufficient trust in her abilities to give her the position. Its expectation was that this trust would be reciprocal; therefore, it found that it was unreasonable for the applicant to share the incidents surrounding the threats with company officials.

[19] This conclusion on the part of the Board is belied by the documentary evidence that shows that militia groups have access to information through a variety of means, including having their members infiltrate various organizations and communities. The preponderance of the evidence shows that commando groups work in connection with the main guerrilla movements in Colombia, including FARC, the known militia group that describes itself as an armed revolutionary force. The applicant knew of their information gathering techniques, including tapping telephone lines. She had a justifiable fear that if she reported the incidents to someone at the company with whom she was not well acquainted, and if that information was not kept confidential, it could hurt her. The finding of the Board that her explanation for not telling anyone at the company about the incidents made "no rational sense" and is not supported by the evidence. Further, it does not necessarily follow that because the company had sufficient trust in the applicant to hire her, that she was logically compelled to report this sensitive information to her employer, notwithstanding the potential risk this would entail given the circumstances.

[20] There may have been certain individuals at work with whom the applicant could have developed a good rapport and a sound working relationship. However, in her testimony, she stated a fear that if the person at the company to whom she reported the information failed to keep it in confidence, she would face reprisals. She did not specify whether such a failure would be deliberate or inadvertent. In my view, keeping quiet or "laying low" was a plausible course of action in light of the general political climate, including the targeting of civilians, mentioned in the documentary evidence.

[21] Similar reasoning applies to the decision of the applicant not to report to the police the attack that she suffered after work one evening. The report on Colombia prepared by the Inter-American Commission on Human Rights, a body of the Organization of American States, outlines the history of paramilitary groups in Colombia and their position relative to police and other state security agents in Colombia. The report states at paragraph 43:

> [...] As was noted above, some paramilitary groups have strong ties to elements of the State's public security forces although they often operate with significant autonomy.

[22] The documentary evidence also included an information package from the Research Directorate, Immigration and Refugee Board, dated January 2002. The information package includes the following passages:

> The report states that the "political work" of urban militias includes indoctrination of youths, developing plans and infiltrating members into different state institutions, while the "operational work" (*operativo*) includes gathering information and following possible kidnap victims (who are handed afterwards to rural

> detachments), sabotage, propaganda, inciting violence during demonstrations, and terrorist acts as required by their leadership (*ibid*)
>
> ...
>
> Each guerilla group has its own urban militias in different regions of the country, but the FARC has the largest network, with its *Milicias Bolivarianas* which have been operating in the main capital cities since 1987 (*ibid*). The next largest network is that of the *Milicias Populares* of the ELN, followed by the *Milicias Obreras* of the Ejército Popular de Liberación (EPL), and other smaller dissident groups which began as branches of guerrilla groups but have evolved into organized crime groups (*ibid*).
>
> Some urban militia groups appear to be branches of a guerrilla front or consider themselves independently-named fronts. For example, a report on threats and attacks against the mayor of Cali reports that FARC militias threatening to kill him described themselves as the "urban front Manuel Cepeda Vargas," while an ELN group that attempted to kill the mayor described itself as "urban militias of the Jose Maria Becerra front" (*ibid.* 4 Oct. 1999).
>
> In recent years, urban militias have been expanding their presence throughout the main cities of Colombia and other smaller urban centres, and authorities regard Medellin as the city with the highest concentration of urban militias (*ibid.* 14 May 1999). These include the Comandos Armados Populares (Armed Popular Commandos, CAP), which originally formed part of the ELN urban militias and currently operate in various areas of the capital of Antioquia; it is particularly known for its extortion of merchants and businessmen, and at least one public transportation company of the city is required to pay a certain amount for every bus that passes through a specific area (*ibid*). (Emphasis added)

[23] The applicant is aware that there are ties between some members of paramilitary groups and some members of the police force or other state agents. She also understands that paramilitary groups have sophisticated means of obtaining information, and that news of her report to the police may have been transmitted to such groups. Her failure to report to the police was consistent with a fear for her life.

[24] Décary J.A., writing for the Court in *Aguebor* v. *Canada (Minister of Employment and Immigration)* (1993, 160 N.R. 315 (F.C.A.), stated that the Board is in the best position to determine

the credibility of an account and draw the necessary inferences. Thus, findings based on the inferences drawn by the Board are not subject to judicial review unless the inferences are so unreasonable as to warrant the intervention of the Court.

[25] Given the considerations discussed above, the inferences drawn in this case were unreasonable to such an extent that it is necessary for the Court to intervene. Inferences must be drawn with regard to all of the evidence. They should not be based simply on a combination of the oral evidence and an intuitive reaction to that evidence. The documentary evidence shows that armed conflict in Colombia puts civilians in a particularly dangerous situation, and daily interactions to which North Americans might give little thought must be approached with caution in Colombia. The decision of the Board was made without adequate regard to this evidence, and ought to be set aside on this basis.

[26] In *Leung* v. *Canada (Minister of Employment and Immigration)* [1994] F.C.J. No. 774, Jerome A.C.J. at paragraph 16 stated:

> Given this clear obligation on the Board to base its decision on the totality of the evidence, combined with the duty to justify its credibility findings, it must be assumed that the Board's reasons contain a reasonably complete account of the facts which form the basis of their decision. The Board will therefore err when it fails to refer to relevant evidence which could potentially refute their conclusions of implausibility. My review of the Board's implausibility findings reveals that such an error has occurred here.

[27] In its decision, the Board stated that it gave no weight to the alleged threats from the guerilla group. Included in its reasons for this finding was the observation that it was not in the disclosure

package of the respondent. The Board stated that the applicant had provided documents of less significance to agents of the respondent upon entry to Canada, but did not provide the letter which contained the threats. This finding was made notwithstanding the absence of a statutory declaration or interview notes by an immigration officer to shed light on what might have occurred, with regards to the letter, at the point of entry.

[28] An examination of the certified record of the Board indicates that the applicant did submit this letter to officials representing the respondent, either upon entry to Canada or soon thereafter. A copy of the letter appears in the first disclosure package of the respondent, at Exhibit 2 of the certified record. A translation of the letter did not appear until a subsequent disclosure package was submitted to the Board, and it was noted that the signature of the translator was missing from this translation. Nonetheless, it was manifestly unreasonable to fail to give weight to the letter on the basis that the applicant did not submit the letter when the record is unclear or arguably indicates otherwise.

[29] The transcript of the hearing does not indicate that the applicant was asked what happened at the port of entry or why she did not submit the letter at that time. In *Gracielome* v. *Canada (Minister of Employment and Immigration)* (1989) 9 Imm. L.R. (2d) 37 (F.C.A.), the Board's decision was overturned where the Court found contradictions. Not only did the Federal Court of Appeal find unreasonable the determination that the evidence in question contained contradictions, it also noted that the applicants were not given an opportunity to clarify the Board's perceived

contradictions. Had the applicant in the present case been asked what she submitted upon arrival in Canada, the Board may have noted the presence of the letter in its Record.

[30] With respect to the demeanour of the applicant, this is normally a matter that is within the exclusive purview of the Board as trier of fact. The panel has the opportunity to observe the demeanour of the witness, an element which cannot easily be gleaned from a reading of the transcript.

[31] However, the inferences drawn by the Board from the demeanour of the applicant were not reasonable. The Board stated, at page 5 of its decision:

> In assessing credibility, the panel also noted the claimant's demeanour while she was testifying. At no time during the hearing did she express the sort of emotions that would have reasonably been expected had she related events that actually happened to her. Instead, she seemed to have a rather remote and indifferent manner while she was testifying about traumatic events, as if she was reciting a memorized script.

[32] The Board, in its reasons, focussed on the applicant's lack of emotion. No other behavioural traits usually associated with a claimant's demeanour, such as evasiveness, confusion or hesitancy were discussed. As noted in *Shaker* v. *Canada (Minister of Citizenship and Immigration)* (30 June 1999), File No. IMM-3448-98, Reed J. (F.C.T.D.), the emotion shown by individuals describing an event will vary. It is not obvious what emotions a person would be expected to show, particularly when describing an event that happened long before the hearing, or what characteristics of that individual would give rise to an expectation that the claimant before the Board would show a given emotion.

[33] If the Board wanted to draw on adverse inference from this lack of emotion, it ought to have explained what aspects of the applicant's personality and background led to its expectations as to her emotions. I am of the view that the Board's sense of her lack of emotion must be questioned, particularly given the time that elapsed between the hearing and the decision. I therefore conclude that the credibility findings of the Board based on the demeanour of the applicant are unreasonable and constitute an erroneous finding of fact.

[34] One last element with respect to the credibility of the applicant that should be addressed is her failure to claim refugee status at the earliest opportunity. Normally, such a delay is associated with a lack of subjective fear. However, it should be remembered that not all persons in need of refugee protection are aware of the availability of the process and the circumstances under which it can be used. In *Williams* v. *Canada (Secretary of State)* (30 June 1995), File No. IMM-4244-94, Reed J. (F.C.T.D.), the ignorance of an applicant regarding the availability of the refugee protection system available to her was held to be a reasonable and credible explanation for her delay in claiming refugee status.

[35] The actions of the applicant must be considered in their entirety in order to determine the effect of her delay in claiming refugee status on the credibility of her subjective fear. She spent between two and three months in the United States and did not claim refugee status until she arrived in Canada. This is but one factor to be considered. I am of the view that, in the circumstances of this case, this is not a determinative factor. Care must be taken not to lose sight of the point that her

behaviour was still consistent with that of someone who wanted to leave a country where she was in danger.

State protection

[36] With regard to state protection, the documentary evidence provides numerous instances in which it is lacking.

[37] In its reasons, the Board did not refer to the documentary evidence on the activities of armed groups. Without referring to such evidence, it concluded that the applicant had failed to put forth clear and convincing proof of a lack of state protection. The Board stated that the documentary evidence shows that Medellin has a high crime rate. The applicant's claim, however, was based on a fear of political violence, not crime. The Board also mentioned that state security forces are not operating, but the applicant never alleged that state security forces were or were not operating in Colombia. These statements illustrate the extent to which the Board has misunderstood the claim and undertaken a faulty analysis.

[38] The applicant testified that she was afraid to go to the police not only out of fear that CAP had infiltrated police forces, but because any of the armed groups forming the network of Bolivarian militia may have done so. The Board erred in construing her testimony to refer only to CAP when she stated that she feared the whole network of groups.

[39] The Board did not refer to documentary evidence on country conditions that supported the stated belief of the applicant that armed militias would know if she went to the police. Specifically, with the group known as FARC controlling up to forty per cent of the territory of Colombia, it is not possible for the government to control and oversee all of the country.

[40] The Board did not refer to documentary evidence on the armed conflict in Colombia. This evidence includes, among other things, reports regarding forced internal displacement and attacks on civilians by armed groups who accuse the civilians of supporting rivals. These problems are particularly acute in Antioquia, the Colombian department in which Medellin is located. Those who are internally displaced continue to feel threatened wherever they go and cannot feel safe anywhere in Colombia. The documentary evidence on these points includes material prepared by Human Rights Watch and the United Nations High Commissioner for Refugees.

[41] The failure of the Board to address the evidence on country conditions that is most relevant to the absence of state protection is demonstrated by the fact that it referred to the high crime rate in Medellin, but not to the documentary evidence about the effects of armed political conflict. The Board's finding that the applicant failed to provide clear and convincing evidence of a lack of state protection was made without regard to the evidence before it.

[42] In *Ward* v. *Canada (Attorney General)*, [1993] 2 S.C.R. 689, the Supreme Court of Canada referred to the *UNHCR Handbook on Criteria and Procedures for Determining Refugee Status* (Geneva, 1992) (the "Handbook"), prepared by the United Nations High Commissioner for

Refugees. The Handbook states that state protection is lacking where a claimant is unable or, for fear of persecution, unwilling to approach the state for protection. The Court held that a claimant must provide clear and convincing evidence of the inability of the state to provide protection in order to be recognized as a Convention refugee on this basis.

[43] Given the understanding by the applicant of the risks associated with seeking the assistance of the police or other authorities, as alluded to above and as supported by the documentary evidence, the applicant had a valid fear of persecution which rendered her unwilling to approach the state for protection. The documentary evidence regarding internal displacement and the ties of paramilitary groups to state security forces is clear and convincing evidence of a lack of state protection and ought to have been seen as such by the Board. I therefore conclude that the Board erred in concluding that state protection was available to the applicant.

[44] On the basis of the above analysis, I allow the application for judicial review and order that the Board's decision be set aside and referred back for rehearing before a differently constituted panel.

[45] The parties have had the opportunity to raise a serious question of general importance as contemplated by section 74(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001, Chapter 27, and have not done so. I do not propose to certify a serious question of general importance.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is granted;

2. The April 4, 2002 decision of the Convention Refugee Determination Division of the Immigration and Refugee Board is quashed and the matter is referred back for rehearing before a differently constituted panel.

3. There is no serious question of general importance to be certified.

"Edmond P. Blanchard"
Judge

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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