Date: 20071211

Docket: IMM-35-07

Citation: 2007 FC 1298

Ottawa, Ontario, December 11, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

LUIS EDUARDO CASTILLO NAAR,
DEVIS ROCIO SANTAMARIA AMARIS and
ANDREA CAROLINA CASTILLO SANTAMARIA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated December 14, 2006, which found that the applicants were neither Convention refugees nor persons in need of protection.

[2] The applicants requested that the decision be set aside and the matter referred back to a newly constituted panel of the Board for re-determination.

Background

[3] Luis Eduardo Castillo Naar, Devis Rocio Santamaria Amaris and their minor child, Andrea Carolina Castillo Santamaria (the applicants) are all citizens of Colombia seeking refugee protection pursuant to sections 96 and 97 of the Act. The principal applicant, Luis Eduardo Castillo, alleged a well-founded fear of persecution by reason of his membership in a particular social group, that is, family membership and his perceived political opinion. The circumstances which led to the principal applicant's claim for refugee status were set out in the narrative portion of his Personal Information Form (PIF).

[4] The principal applicant's father was a police detective who served in the Security Administration Department (DAS), which controls the immigration and emigration of foreigners and their movement within Columbia. The principal applicant's father's duties included investigating, policing and presenting cases for prosecution. The principal applicant alleges that while working in the DAS, his father was responsible for arresting many members of guerrilla organizations (namely the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN)) for various crimes including drug trafficking.

[5] In May 2005, the principal applicant alleges that he received a phone call at home. The unidentified caller asked for his father. When the principal applicant informed the caller that his father was not there, the caller told him to tell his father "to be careful because 'we' are going to finish him off by hurting him where he would hurt the most, by hurting his sons". The principal applicant alleges that the caller then added "we have located them; we know where each works." When the principal applicant asked the caller why he was making these threats, the caller said that his father would know.

[6] In July 2005, the principal applicant alleges that his father received a phone call from a man who said that he was reminding his father of their previous call. When the father inquired as to the identity of the caller, the caller stated "you'll find out who we are when we finish with Luis Eduardo and Jack, and we know where they work."

[7] In September 2005, the principal applicant alleges he answered yet another threatening call. While he believes that it was a different caller, the man repeated the same threat. The principal applicant reported the threat to the Attorney General's Office on October 19, 2005. He is not certain whether the phone calls were ever intercepted as he had requested in his report.

[8] On October 24, 2005, the principal applicant left Colombia for Canada. He was sent to Toronto by his employer to study English at York University. On October 28, 2005, he went to a Canadian immigration office and advised the officer that he wished to make a refugee claim.

[9] On November 2, 2005, the principal applicant alleges that his father was on his way to a shopping center when he was accosted by a man who insulted and threatened him. The attacker reminded the principal applicant's father of his time working for the DAS, and then slowly backed away. The day after the incident, the principal applicant's father gave an oral statement to the police in Puerto Colombia concerning both the phone threats and the previous day's incident. A formal report was made and the police promised to investigate. The following day, the father reported the event to the Attorney General's office.

[10] Since these incidents, the principal applicant's parents have left their town to stay with relatives elsewhere. The principal applicant's brother is afraid, but hopes that because he travels a great deal he can avoid the threats. The principal applicant's wife and child are living mostly with his in-laws. The applicants' hearing was held on November 9, 2006 and a negative decision was rendered on December 14, 2006. This is the judicial review of the Board's decision.

Board's Decision

[11] The Board began by noting that the applicants were all citizens of Mexico seeking refugee protection. I note here that the applicants are not citizens of Mexico, but Colombia. The Board then stated that the determinative issues in the application were credibility and whether the claim was well-founded. The Board noted that testimony given under oath is presumed to be true unless there is a valid reason to doubt its truthfulness. The Board also noted that it was guided by the principal articulated in *Faryna* v. *Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 357, which held that the

truthfulness of a witness's story depends on its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable given the circumstances.

[12] In rendering its decision, the Board made the following findings:

- The Board did not find the principal applicant to be a credible or trustworthy witness.
- The Board found that it was mere speculation on the principal applicant's part that the anonymous phone threats were from the FARC and/or the ELN.
- The Board was not persuaded that the principal applicant and/or his family were ever approached or threatened by the FARC or the ELN at the material time indicated by the principal applicant.
- The Board found that given that the principal applicant did not flee Colombia because of the threats but came to Canada to study English and given that his family are still in Colombia, it belies his subjective fear.
- The Board found that given the negative credibility findings in areas central and material to the principal applicant's claim, there was not a serious possibility that he would be persecuted for a Convention ground should he return to Columbia.

[13] With regards to the section 97 analysis, the Board noted that it had reviewed all the documentation and found that there was no evidence that the principal applicant would be subjected to any risk, other than that of general violence in Colombia. The Board did not find that the principal applicant would face a risk to his life or be subjected to cruel and unusual treatment or

punishment or torture should he return to Columbia. Finally, the Board stated that as the associated claims were based on the principal applicant's evidence which the Board found not to be credible, the Board made the same finding.

Issues

[14] The applicants submitted the following issues for consideration:

1. Did the Board err in overlooking and misstating evidence central to the applicants' claims?
2. Did the Board err in failing to give cogent or any reasons for its negative decision?
3. Did the Board err in failing to adequately assess the issue of risk under paragraph 97 of the Act?

[15] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Board fail to consider the documentary evidence relevant to the applicants' claims?
3. Did the Board err in finding that the principal applicant was neither credible, nor trustworthy as a witness?
4. Did the Board err in failing to conduct a separate section 97 analysis?

Applicants' Submissions

[16] The applicants submitted that the Board failed to properly consider all the evidence central to the applicants' claim. The applicants submitted that they are citizens of Colombia, not Mexico as set out by the Board. The applicants submitted that the Board mentioned only one of the threatening phone calls answered by the principal applicant, and thus erred in failing to consider the other threatening incidents, namely, the second and third phone calls, the assault on his father and the tailing of his wife.

[17] The applicants submitted that it was inaccurate for the Board to state without qualification that the principal applicant "alleged that he became a target of the FARC or the ELN and to characterize his testimony on the identity of the persons who threatened him as "mere speculation". The applicants submitted that the principal applicant did not baldly allege or speculate as to the identity of these persons, but yet wrote in his PIF and testified at the hearing that he may have been targeted by ordinary criminals whom his father had arrested and been instrumental in imprisoning. In any case, the applicants submitted that the Board's finding that without certainty about identity the claims are not credible, is unreasonable.

[18] The applicants submitted that in dismissing the police and Attorney General's reports because they lacked "evidence which confirmed that it was the FARC or the ELN" who made threats, the Board misapprehended the nature of these documents. The applicants submitted that the reports were only observations and that it was up to the authorities to investigate and determine the

identity of those persons. The reports go to the occurrence of the incidents and not the identity of those involved.

[19] The applicants submitted that the principal applicant's conduct in deciding while en route to Canada to make a refugee claim emphasizes – rather than, as the Board says "belies" – the applicants' subjective fear. The Board's finding that the fact that the principal applicant's parents' and siblings' remain in Colombia "belies" the subjective fear is unexplained and inexplicable when in fact the family members are all in hiding.

[20] The applicants submitted that the Board's examples of lack of credibility are unfounded or ill-founded as the Board does no more than imply that there are inconsistencies or implausibilities in the principal applicant's testimony. Judicial review should be allowed where it is not clear in the Board's reasons whether they questioned the truthfulness of the applicant's evidence or whether, on the evidence, the applicant failed to satisfy the Board that his fear of persecution was well-founded.

[21] The applicants also submitted that the Board failed to consider the particular circumstances of the applicants in light of the documentary evidence concerning the targeting of family members of those who are or were involved in the administration of justice. Specifically, the applicants submitted that the United National High Commission for Refugee Report (UNHCR Report) discusses how past and present members of state security forces and their families are among the groups at heightened risk of persecution and serious harm, and thus, the Board should have expressly addressed this report.

[22] Lastly, the applicants submitted that the Board's summary dismissal of the section 97 claim falls well short of the analysis required as the Board has not made an individualised assessment of the risk.

Respondent's Submissions

[23] The respondent submitted that the applicants have failed to show that the Board did not consider all of the evidence. The respondent submitted that although the Board mistakenly noted that the applicants were citizens of Mexico, the Board was obviously alive to the nature of the applicants' claim and their alleged fears in Colombia. Immaterial and isolated mistakes raise no ground for judicial review (*Miranda* v. *Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 81; *Nyathi* v. *Canada (Minister of Citizenship and Immigration*, 2003 FC 1119; *Gan* v. *Minister of Public Safety and Emergency Preparedness*, 2006 FC 1329). The respondent submitted that the Board did not err in failing to mention the further phone calls. The Board is presumed to have considered all of the evidence unless the applicant can establish otherwise (*Hassan* v. *Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (C.A.)). The respondent submitted that the Board did in fact refer to the second phone call and the reports of the other incidents and thus the applicants' argument is baseless. The respondent submitted that with regards to the credibility findings, the applicants' clearly based their claim on the allegation that they were likely being threatened by the FARC or ELN. Thus, it was reasonable for the Board to find in light of the speculative evidence before it that the applicants were never approached or threatened by the FARC or ELN. The respondent submitted that the applicants are really taking issue with the Board's

weighing of the evidence and findings of fact, which are entitled to the highest degree of deference (*Chen* v. *Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1194).

[24] The respondent submitted that the applicants have failed to raise any serious issue with respect to the adequacy of the Board's reasons. The respondent submitted that the Board's findings were reasonable, and its decision was reasonably substantiated. The respondent submitted that the applicants are not really taking issue with the adequacy of the reasons, but yet the reasonableness of the Board's finding that their subjective fear was not credible. When the standard of review is one of patent unreasonableness, it is not sufficient to present an alternative line of reasoning with a reasonable explanation. Instead, the applicant must identify a conclusion of the Board that is not supportable in any way by the evidence (*Sinan* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 87 at paragraph 11).

[25] The respondent submitted that the applicants' submission that the Board erred in conducting a summary analysis of their section 97 claim raises no serious issue for judicial review. The respondent submitted that without any credible evidence on the central and material elements of the claim, it was reasonable for the Board to find the applicants would not face a risk to life or of cruel and unusual treatment or punishment or a danger of being tortured upon return to Colombia. When there is no credible evidence left to link the claim to a basis of protection afforded by section 97 of the Act, the Court has found it reasonable for the Board to dismiss the claim (*De Silva* v.*Canada (Minister of Citizenship and Immigration)*, 2004 FC 1141 at paragraphs 9 to12; *Hersi* v. *Canada*

(Minister of Citizenship and Immigration), 2005 FC 426 at paragraph 7, *Nyathi* above at paragraph 21, *Alas* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 1441 at paragraph 14).

Analysis and Decision

[26] **Issue 1**

What is the appropriate standard of review?

With regards to the consideration of documentary evidence, the Board may evaluate the probative value of evidence, including documentary evidence, and the standard of review applicable to such findings is patent unreasonableness (see *Akhter* v. *Canada (Minister of Citizenship and Immigration)* 2006 FC 914).

[27] With regards to the Board's credibility findings, the appropriate standard of review is one of patent unreasonableness; they are accorded a high level of deference (see *Juan* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 809 at paragraph 2).

[28] I propose to deal first with Issue 3.

[29] **Issue 3**

Did the Board err in finding that the principal applicant was neither credible nor trustworthy as a witness?

The applicants submitted that the Board erred in finding that the principal applicant was neither a credible, nor a trustworthy witness. The respondent submitted that the Board's credibility findings attract the highest level of deference and should not be interfered with by the Court unless there was no evidence before the Board capable of supporting its finding.

[30] I agree with the respondent that credibility findings are owed the utmost level of deference. In *Juan* above, Justice Dawson of this Court articulated at paragraph 2:

> The standard of review to be applied to the Board's findings of credibility is patent unreasonableness. A high level of deference is given because under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 it is the Board that is responsible for making findings of fact and credibility in respect of refugee claimants, and it is the Board that has the opportunity to observe first-hand the demeanour of claimants and other witnesses who appear before it.

[31] However, Justice Dawson went on to note at paragraph 4 that where the Board's finding of a lack of credibility is based on implausibilities:

> […] there must be a basis in the evidence to support the inferences (*Miral* v. *Canada (Minister of Citizenship and Immigration*), [1999] F.C.J. No. 254 (F.C.T.D.) at paragraph 25). Put another way, inferences must be based upon more than an intuitive reaction to evidence.

[32] Page 3 of the Board's decision reads:

> Further, the claimant's own evidence was that he did not flee Colombia because of threats but came to Canada to study English, sponsored by his workplace. The claimant's evidence revealed that he came to the decision to make a refugee claim after having a conversation with another Spanish-speaking person on the flight to Canada. The panel finds that taken together with the very fact that

> the claimant's father, mother, brother and sister are still in Colombia, it belies his subjective fear. [Emphasis added.]

[33] In my opinion, the Board's finding that the applicants' subjective fear is contradicted by the fact that the principal applicant did not come to Canada initially seeking refugee status and that his family members remained in Colombia is patently unreasonable. The inference drawn, that the principal applicant lacks a subjective fear because he did not come to Canada with the initial intention of claiming refugee status, is no more than an intuitive reaction to the evidence. There is no evidence on the record to show that coming to Canada with one motivation and then claiming refugee status thereafter lessens an applicant's subjective fear. Additionally, in this case the principal applicant claims that he did not know until his conversation on the flight to Canada that he was able to seek refugee status in Canada. Moreover, the principal applicant's PIF provided ample evidence that while many of his family members had remained in Colombia, they had all made efforts to move away or stay away from the location where the threats took place. In fact, during the oral hearing the principal applicant testified that both his brother and parents were taking actions to ensure their departure from Colombia. This finding was central to the Board's ultimate finding on credibility and subjective fear.

[34] The Board also appears to have based its decision as to credibility on the fact that the callers never identified themselves to the principal applicant or his father and that it was "mere speculation" on the applicants' part that the callers were members of FARC or the ELN. This finding by the Board does not support a finding of non-credibility of the principal applicant. It was not mere speculation by the principal applicant that the callers were from FARC or the ELN. The

principal applicant stated in his PIF that he was almost certain that the callers were from FARC or ELN. In any event, just because the threatening caller does not identify himself, does not make the principal applicant not credible.

[35] The Board also made reference to the police report and the report of the Attorney General and stated that there was no evidence in these reports to confirm that the callers were from FARC or the ELN. Again, this cannot serve as a basis for finding the principal applicant not to be credible.

[36] In summary, I find the Board's credibility finding to be patently unreasonable.

[37] The application for judicial review is therefore allowed and the matter is referred to a different panel of the Board for re-determination.

[38] Neither party wished to submit a proposed serious question of general importance for consideration for certification.

JUDGMENT

[39] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different panel of the Board for re-determination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

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.
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	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au

Article 1 of the Convention Against Torture; or

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 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.

(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.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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