Date: 20080204

Docket: IMM-651-07

Citation: 2008 FC 144

Ottawa, Ontario, February 4, 2008

PRESENT: The Honourable Orville Frenette

BETWEEN:

ROMEL ABUTAN ARAGON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated January 22, 2007 concluding that the applicant was not a Convention refugee or a person in need of protection.

I. Facts

[2] The applicant is a 36-year-old citizen of the Philippines who is claiming refugee protection in Canada on the basis of a well-founded fear of persecution by reason of membership in a particular social group; namely as a victim of extortion.

[3] The applicant alleges in his Personal Information Form (PIF) that the persecution began when he was involved in a motor vehicle accident in May 2005. The applicant claims that after he accidentally hit a parked vehicle in a parking lot, he agreed to compensate the owner of the car for any damage caused.

[4] The applicant claims that on June 12, 2005 the vehicle's owner approached him demanding further compensation for time lost at work owing to the accident. The applicant agreed to pay the vehicle owner in order to "end my problem," but claims that this did not stop the individual from continuing to demand more and more money from him. The applicant alleges that when he finally refused to pay more money, the individual took out a gun and threatened the applicant's life. He applied for a Canadian visitor visa and obtained it on June 23, 2005.

[5] On August 15, 2005, the applicant arrived in Canada on his visitor's visa with the stated intent of visiting his brother, who is a Canadian citizen, attending his nephew's wedding, and traveling. The applicant's visa was valid from June 23, 2005 until December 22, 2005. When his

visa expired, the applicant tried, unsuccessfully, to get it renewed in order to, as stated in his original PIF, "see how beautiful this country was."

[6] On January 11, 2006, the applicant filed an application for refugee protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

II. Decision under review

[7] On January 22, 2007, the Board determined that the applicant was not a Convention refugee or a person in need of protection. The Board's decision was based on the applicant's lack of credibility, as well as a finding that there did not exist any subjective or objective basis to the applicant's alleged fear of persecution.

[8] In its decision, the Board made several negative credibility findings, many of which were associated with discrepancies between the applicant's original PIF narrative, filed January 31, 2006, and his twice-amended narrative, dated July 25 and November 14, 2006. These discrepancies included that:

1. the applicant's original PIF failed to mention that the individual whose car he hit was a police officer;
2. the applicant's original PIF stated that the individual approached the applicant for more money one week after the accident, while the amended PIF listed a date approximately three weeks following the accident;

3. the applicant's original PIF did not mention the allegation that, in July 2005, the police officer telephoned the applicant on numerous occasions demanding more money; and
4. the applicant's original PIF failed to mention that he reported the alleged threats to his life to the police, while the amended PIF listed many details about the applicant's reporting of the threats.

[9] The Board held that the discrepancies between the original PIF narrative and the amended versions were a result of the applicant's attempt to bolster his refugee claim and, accordingly, undermined the credibility of his claim.

[10] The Board also found that the applicant's evidence was not clear and convincing so as to "rebut the presumption that the state had the ability to protect him" from the alleged agent of persecution. Further, the Board found that the applicant's subjective fear was undermined by his lack of credibility, as well as by the fact that he did not leave the Philippines for Canada immediately upon the issuance of his Canadian visitor's visa on June 23, 2005.

III. Issues

[11] The applicant raises four issues in this application, all of which relate to the overarching issue of whether the Board erred in concluding that the applicant was not a Convention refugee or a person in need of protection. Those issues are whether:

1. the Board erred in assessing the applicant's credibility;
2. the Board erred in finding that the applicant's delay in leaving the Philippines and claiming refugee status upon arriving in Canada belied a well-founded fear of persecution and indicated the absence of a subjective fear of persecution;
3. the Board erred in finding that the applicant failed to rebut the presumption of state protection; and
4. the Board breached the rules of natural justice in failing to provide a complete transcript of the refugee hearing proceedings.

IV. Standard of review

[12] In *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.), the Federal Court of Appeal confirmed that the Board's factual findings, including its credibility determinations, will only be set aside if found to be patently unreasonable. As Mr. Justice Décary stated at paragraph 4:

> 4 There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. …

Accordingly, the first and second issues will be reviewed on a standard of patent unreasonableness, meaning that the Board's findings will only be set aside if they are "clearly irrational" or "evidently

not in accordance with reason": *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247.

[13] With respect to the third issue regarding state protection, it is clear that the Board's findings of fact, including its finding of whether state protection is available, are entitled to great deference and will only be set aside if patently unreasonable: *Quijano v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1706, [2005] F.C.J. No. 2110 (QL). However, once those findings have been made, they must be assessed against the test set out in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, which is a question of mixed fact and law and is, accordingly, entitled to less deference by the reviewing court: *Rey Nunez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1661, 51 Imm. L.R. (3d) 291. Accordingly, such a decision will be reviewed on a standard of reasonableness *simpliciter* and will only be set aside if there is no line of analysis within the given reasons that can support the Board's conclusion: *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, 45 Imm. L.R. (3d) 58.

[14] Finally, where a reviewing court is considering whether the Board observed the principles of natural justice or procedural fairness, the standard of review is correctness. Accordingly, if the Board's failure to provide a complete transcript of the refugee hearing amounted to a breach of natural justice, then no deference is due and the decision will be set aside: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392.

V. Analysis

1. Did the Board err in assessing the applicant's credibility?

[15] The applicant argues that three of the Board's credibility findings were flawed. Specifically, the applicant states that the Board erred:

1. in impugning his credibility on the basis that he amended his PIF narrative to include that the vehicle owner was a police officer and that, accordingly, he was being extorted by an agent of the state;
2. in impugning his credibility on the basis that he amended his PIF narrative to alter the timing of the third encounter with the police officer; and
3. in impugning his credibility on the basis that he amended his PIF narrative to include that he had received phone calls from the owner of the vehicle and that he reported the incident to police.

[16] In relation to the first credibility finding, the applicant states that the amendment was made solely for the purpose of clarifying who the owner was, and conformed with evidence that was already on record before the Board; namely the Schedule 1 Background Information form the applicant signed on January 10, 2006 just prior to claiming refugee protection. In that document, the applicant cited a fear in returning to the Philippines on account of a "Threat for my life," and went on to state that the individual he fears is "a police officer" who was "extorting money and threatening my life arising from a vehicular accident."

[17] In relation to the second credibility finding, the applicant states that the Board appears to be impugning the applicant's credibility simply on the basis of the amendment, without any other justifiable reason. According to the applicant, such a finding is in error since it contradicts subsection 6(4) of the *Refugee Protection Division Rules*, S.O.R./2002-228 (the RPD Rules), which permits the changing of any information in a refugee claimant's PIF.

[18] Finally, in relation to the third credibility finding, the applicant states that the addition was made because he was confused about what facts needed to be outlined within the PIF.

[19] Upon reviewing the record and the amendments made to the applicant's PIF narrative, I must conclude that the above-noted credibility findings were open to the Board to make, and will not be set aside as patently unreasonable. First, while subsection 6(4) of the RPD Rules allows for the amendment of an individual's personal information, I agree with the respondent that the simple ability to amend a PIF narrative is not responsive to the credibility concerns that may arise from such an amendment. Not all amendments can justify a negative credibility assessment: *Akhtar v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 560, [2002] F.C.J. No. 730 (QL); *Ameir v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 876, 47 Imm. L.R. (3d) 169.

[20] In the case at bar, the applicant made substantial additions to his narrative; additions that clearly buttressed his claim for refugee protection. I cannot accept as true the applicant's assertion that he was unaware of what information should be included in his PIF narrative. The requirements addressing what must be included in a narrative are clearly outlined at Question 31 of the PIF.

These requirements state that the refugee claimant must outline all of the material facts relating to their claim, including:

1. all significant events and reasons that have led the claimant to claim refugee protection in Canada;
2. the details of any steps taken to obtain protection from authorities in their country of origin and the result; and
3. any steps taken to find refuge by going to another part of their country of origin.

[21] The applicant's failure to disclose in his original PIF that he "immediately" reported the firearms threat to the police was a significant omission that justified the Board's negative credibility finding. The same reasoning applies to the applicant's initial failure to account for the July 2005 telephone calls he allegedly received from the vehicle owner. Both omissions involve significant and important aspects of the applicant's refugee claim that should have been included in the original PIF. These omissions do not address minute details of the claim that the applicant was merely clarifying through amendment. Rather, they go directly to the heart of the applicant's claim.

[22] Accordingly, the Board's finding that such omissions impacted negatively on the applicant's credibility was within its power to make, and will not be set aside by this Court as a patently unreasonable error: *Kutuk v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1754 (QL).

2. *Did the Board err in finding that the applicant's delay in leaving the Philippines and claiming refugee status upon arriving in Canada belied a well-founded fear of persecution and indicated the absence of a subjective fear of persecution?*

[23] The applicant outlines that the reason for his delay in claiming refugee protection was that he did not know about the refugee process in Canada and only came to know about the process when informed of it by his brother's friend.

[24] Accordingly, the applicant submits that the Board erred in failing to provide any reasons why it rejected the applicant's explanation for his delay in claiming refugee protection upon his arrival in Canada. In support of this argument, the applicant points to *Tariq v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 404, 44 Imm. L.R. (3d) 256, where Madam Justice Mactavish stated at paragraph 14:

> 14 It is true that delay in claiming refugee protection can significantly call into question the *bona fides* of a refugee claimant's subjective fear of persecution… That said, where, as here, claimants offer an explanation as to why they did not make their claims any sooner, it is incumbent on the Board to consider that explanation, and to decide whether it provides a reasonable justification for the delay, or whether it is indicative of a lack of subjective fear.

[25] Further, the applicant states that his delay in leaving and claiming refugee protection is not in itself determinative in establishing that he lacks a subjective fear. In support, the applicant cites Madam Justice Dawson's decision in *Juan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 809, [2006] F.C.J. No. 1022 (QL), where she states at paragraph 11:

> 11 It is well settled law that a delay in seeking refugee status may be a relevant factor when assessing a claimant's credibility. However, delay in claiming protection cannot, in and of itself, justify the rejection of a claim to Refugee status or to protection. It follows that the Board's finding with respect to delay is, by itself, an insufficient basis for maintaining its denial of the claim.

However, it was decided by the Federal Court of Appeal in *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (F.C.A.), that while the delay in making a refugee claim is not a decisive factor in itself, it is "a relevant element which the tribunal may take into account in assessing both the statements and the actions of the claimant."

[26] It is clear from the Board's decision that the applicant's argument in this regard must fail. I agree with the respondent that the Board clearly considered the applicant's explanation at page 5 of its decision, outlining first the applicant's reasons for his delay, and then providing its own reasons why it considered that explanation unpersuasive. As the Board stated:

> The claimant had a Canadian visitor's visa (CVV) as of June 23, 2005, but did not leave his country until August 2005 because he had no plan of hiding in Canada, and did not know about refugee claims. Once he was here, he learnt of the refugee system only after his brother's friend told him about it. Moreover, he first wanted to see what life here would be like, and agreed he was weighing his options before claiming.
>
> Either there was a threat to his life when the claimant was in the Philippines, or there was not. If, indeed, the events occurred as alleged, then the danger was the same when he was in his country, and also when he was in Canada. The panel finds not leaving at first opportunity, and first considering what life in Canada would be like before making a claim, belie a well-founded fear of persecution or need for protection, and indicate an absence of subjective fear.

[27] It is clear from this statement that after weighing the applicant's explanation for his delay in leaving the Philippines and claiming refugee protection in Canada, the Board ultimately concluded that his explanation was insufficient to satisfy the Board that he possessed a subjective fear of persecution. As the respondent suggests, the applicant's stated reasons were more consistent with a wish to immigrate, rather than a desire to flee persecution.

[28] Further, in response to the suggestion that delay itself is not enough to justify rejecting the applicant's claim, it is clear from the Board's decision that its finding regarding the applicant's delay was not the sole reason for rejecting his claim, but rather, merely acted in combination with the Board's other credibility findings to further undermine the applicant's credibility and justify its decision that the applicant did not, in fact, possess a well-founded fear of persecution. When taken together, these considerations provide clear and concise justification for the Board's ultimate conclusion.

3. Did the Board err in finding that the applicant failed to rebut the presumption of state protection?

[29] The applicant argues that there was "clear and convincing" documentary evidence before the Board addressing the issue of state protection in general, and why it was objectively reasonable for the applicant to not seek further state protection. The applicant further contends that the Board failed to consider this evidence in reaching its decision, and that that failure amounts to a reviewable error.

[30] The Respondent submits the Philippines is a functioning democratic state, even though it has problems as other democratic countries have: *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 150 N.R. 232 (F.C.A.); *Kadenko v. Canada (Solicitor General)* (1996), 143 D.L.R. (4th) 532 (F.C.A.); and *Quijano*, above.

[31] It is clear from a review of the decision that the Board did, in fact, consider objective documentary evidence concerning the state's human rights practices and ability to protect its citizens. That evidence was the 2005 U.S. Department of State Country Report on the Philippines' human rights practices, which states that while the perception of corruption in the public service is high, there is no information suggesting that the government is totally unable to provide adequate protection to individuals such as the applicant. Further, the Report makes clear that throughout 2005 there were significant efforts underway to reform the Philippine National Police (PNP), and that during this time nearly 200 PNP officers were dismissed for objectionable conduct. This evidence provides more than a reasonable basis for the Board's conclusion that the applicant should have proceeded with his efforts to obtain state protection in the Philippines prior to filing for refugee protection in Canada.

[32] It must also be noted that the Board's finding of adequate state protection must also be read in light of its negative credibility findings. Essentially, while the applicant stated in his amended PIF narrative that he "immediately" reported the firearms incident to the PNP, this evidence was found to be not credible by the Board, thereby suggesting that its consideration of adequate state protection was not even necessary to the proper disposition of the applicant's refugee claim. This was admitted

by the applicant, in his Further Memorandum of Argument, as he stated that the "determinative issue" of the Board's decision was the applicant's credibility. Accordingly, Court intervention into the Board's finding on this issue is not warranted.

4. Did the Board breach the rules of natural justice in failing to provide a complete transcript of the refugee hearing proceedings?

[33] In his Further Memorandum of Argument, the applicant argues that the Certified Tribunal Record is incomplete and, as a result, the Board breached the rules of natural justice thereby entitling the applicant to a new hearing. The applicant submits that a recording malfunction caused much of his direct testimony to be missing from the transcript, including: what had occurred after he had gone to the police; his reasons for the omissions in his PIF narrative; his explanation regarding the delay in filing for refugee protection in Canada; and his testimony regarding the availability of state protection in the Philippines.

[34] The applicant submits that even though the Board and counsel took steps to supplement the record by reading from their hearing notes, this is insufficient to offset the breach of natural justice that occurred.

[35] In *Benavides v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 323, 289 F.T.R. 104, Mr. Justice O'Keefe effectively outlined the law regarding when the absence of a transcript violates the rules of natural justice, stating at paragraphs 29-30:

29 In *Canadian Union of Public Employees, Local 301* v. *Montreal (City of)*, [[1997] 1 S.C.R. 793], Justice L'Heureux Dubé set out at paragraph 81, the test for whether the absence of a transcript violates the rules of natural justice:

> In the absence of a statutory right to a recording, courts must determine whether the record before it allows it to properly dispose of the application for appeal or review. If so, the absence of a transcript will not violate the rules of natural justice. Where the statute does mandate a recording, however, natural justice may require a transcript. As such a recording need not be perfect to ensure the fairness of the proceedings, defects or gaps in the transcript must be shown to raise a "serious possibility" of the denial of a ground of appeal or review before a new hearing will be ordered. These principles ensure the fairness of the administrative decision-making process while recognizing the need for flexibility in applying these concepts in the administrative context.

30 In *Goodman* v. *Canada (Minister of Citizenship and Immigration)* (2000), 185 F.T.R. 102 (T.D.), Justice Lemieux stated at paragraph 75:

> In my view, in this case, the following factors should be considered in determining whether the transcript hearing gap in the CRDD proceedings amounts to a serious possibility that Mr. Goodman will be denied a ground for review:
>
> (1) the grounds for review advanced;
>
> (2) the importance of the impugned findings to Mr. Goodman's refugee claim;
>
> (3) the basis upon which the CRDD arrived at its conclusions or findings and by this I mean did the CRDD base its conclusions on findings of incredibility, or findings of fact or as a matter of legal interpretation;
>
> (4) what was the subject matter of the transcript gaps … and the significance of the transcript gap to the impugned findings, that is, how material was the

> subject matter or content of the transcript gap and what reliance did the tribunal place on it;
>
> (5) what other means did the tribunal use to fill the gap; and
>
> (6) what other means were available to the Court to determine what went on at the hearing.

If a significant point of the transcript is unavailable, a new hearing will be ordered: *Richard v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 967, [2002] F.C.J. No. 1262 (QL); *Agbon v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 356, [2004] F.C.J. No. 407 (QL); *Benavides*, above; and *Ortiz v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 346, [2005] F.C.J. No. 442 (QL).

[36] In the case at bar, the applicant alleges that because the Board's decision was based on its negative credibility findings regarding the applicant's original and amended PIF narratives, then the applicant's direct testimony regarding the omissions is necessary in order for this Court to be able to conduct a meaningful judicial review.

[37] With respect, I cannot accept the applicant's argument. While the applicant cites many cases in support of his position that a meaningful judicial review cannot occur in the absence of a transcript of the applicant's complete direct testimony, most of the cases cited dealt with situations where there did not exist any transcript of the proceedings due to some form of technical or human error. That is not the case hear, where the transcript is comprised of the applicant's initial direct testimony and, once an error in recording occurred, an overview of the applicant's remaining

testimony as provided by a recitation of the written notes of the Board member and the applicant's counsel.

[38] It is clear from the record that this error was caught while the hearing was in process, and that the parties took steps to supplement the existing record so as to satisfy the requirements of natural justice. Further, at no point during the hearing did the applicant's counsel object to the steps taken by the Board to remedy the error and, presumably from the record, agreed to the steps taken at the time. On this issue, the applicant is fluent in English, and represented here by Counsel without objection, an implied waiver is in effect: *In re the jurisdiction of a Human Rights Tribunal to continue its inquiry and in re a complaint of Local 916 of the Energy and Chemical Workers' Union dated April 27, 1979, filed pursuant to section 11 of the Canadian Human Rights Act (S.C. 1976-77, c. 33 as amended) against Atomic Energy of Canada Limited*, [1986] 1 F.C. 103 (C.A.); *Yassine v. Canada (Minister of Employment and Immigration)* (1994), 172 N.R. 308 (F.C.A.).

[39] The question before this Court is whether the Board's steps in supplementing the transcript were sufficient to allow for a meaningful judicial review of the Board's decision. Having reviewed the record and the arguments of the parties, there was no perception of a breach of natural justice at the time of the hearing and, accordingly, no breach of natural justice that warrants the intervention of this Court.

[40] Accordingly, this application for judicial review must be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application be dismissed. No question is certified.

"Orville Frenette"

Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-651-07
STYLE OF CAUSE:	Romel Abutan Aragon **v.** MCI
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 16, 2008
REASONS FOR JUDGMENT AND JUDGMENT BY:	Deputy Judge Frenette
DATED:	February 4, 2008

APPEARANCES:

Vaska Bozinovski	FOR THE APPLICANT
Kristina Dragaitis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Vaska Bozinovski Barrister & Solicitor 4665 Yonge Street, Suite 304 Toronto, Ontario M2N 0B4	FOR THE APPLICANT
John H. Sims Deputy Attorney General of Canada	FOR THE RESPONDENT