

Date: 20081114

Docket: IMM-1883-08

Citation: 2008 FC 1267

Ottawa, Ontario, November 14, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

VICTOR FERNANDO MEDINA MORALES

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 December 10, 2007 concluding that the applicant, a Mexican citizen, is not a Convention refugee or a person in need of protection because of the availability of an internal flight alternative (“IFA”) in Mexico City.

FACTS

[2] The applicant is 29 years old. He arrived in Canada on January 10, 2007 seeking refugee protection on the basis of his fear of persecution as a homosexual in Mexico.

[3] In September 2006, the applicant began a relationship with Jose Gonzalez Jiminez, a student at the university where the applicant was employed. Mr. Jiminez's father, Alberto Jiminez, is a lawyer at the Procuraduria General de la Republica ("PGR"), or the Office of the Attorney General. The applicant states that as a result of this position, the elder Mr. Jiminez is in charge of police patrols.

[4] The applicant states that when Mr. Jiminez found out about the applicant's relationship with Jose, he was infuriated. The applicant states that Mr. Jiminez went to the university where the applicant was employed and spoke with the dean of the university. The applicant was called to the dean's office and told that a serious complaint had been made against him. In mid December, the applicant was told that his contract with the university would not be renewed.

[5] In early December, while walking home from the bus stop, the applicant was assaulted by two police officers who verbally abused him, struck him, and told him to "stay away from Jose." The applicant states that he attempted to file a complaint with the police, but left the police station after observing one of his assailants there.

[6] The applicant subsequently left his home in Villahermosa and went to stay with relatives in Oaxaca. He states that his family received threatening notes and drawings after he left, and that his “macho” cousins voiced their anger at his homosexuality. The applicant travelled to Canada on January 10, 2007.

[7] The applicant states that he fears he will be killed by Jose Jimenez’s father, the police, or homophobic members of his community, including his own cousins, if he returns to Mexico.

[8] Since coming to Canada, the applicant has become involved in a common-law relationship with a Canadian citizen. The applicant states that he and his Canadian partner wish to start a family and have children together. The applicant argues that he would not be able to parent a child in the context of a homosexual relationship in Mexico, and that this fact itself constitutes persecution and cruel and unusual treatment.

Decision under review

[9] The Board heard the applicant’s claim on December 10, 2007. The Board denied the applicant’s claim on the basis that the applicant had an internal flight alternative (“IFA”) in Mexico City. The applicant has not challenged this finding in his application for judicial review.

ISSUE

[10] The issue to be considered in this application is whether the Board erred in failing to consider the question of whether the restriction on the applicant's ability to adopt and parent a child in Mexico on the basis of his sexual orientation constitutes persecution and/or cruel and unusual treatment.

STANDARD OF REVIEW

[11] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question."

[12] In *Allahi v. Canada (MCI)* 2004 FC 271, 129 A.C.W.S. (3d), Mr. Justice Von Finckenstein held at paragraph 8, citing *Ward v. Canada (Attorney General)*, [1993] 2 S.C.R. 689 and *Hartley v. Canada* (2000), 189 F.T.R. 296, that "the Board is obliged to consider all of the arguments advanced by the applicant and all of the possible grounds upon which he might face persecution in his country of origin." In *Sampu v. Canada*, 2001 FCT 756, 107 A.C.W.S. (3d) 107, Justice Tremblay-Lamer held at paragraph 10 that the failure of the Board to "consider the totality of the evidence tendered in support of the applicant's claim" was an error of law. The appropriate standard of review for an error of law is correctness.

[13] At issue in this application is whether the Board erred in law by failing to consider an argument raised by the appellant. Accordingly, the decision will be reviewed on a standard of correctness.

ANALYSIS

[14] The applicant states that one of the grounds that he raised at the hearing was that he and his partner would not be allowed to marry or to adopt a child in Mexico, due to their sexual orientation. The applicant argues that this was a serious issue that was not mentioned in the Board's decision.

[15] The Court must conclude that the Board did not err in failing to deal with this issue as a substantive issue for the refugee claim. First, the applicant did not raise this specific issue as a basis for his refugee claim prior to the hearing in either his personal information form before the Board, or at the time he entered into Canada and said that he wanted to make a refugee claim. Second, at the outset of the hearing, the presiding member identified the substantive issues and invited the applicant's counsel to comment on them. Again, this specific issue was not identified by the applicant or the applicant's counsel. Third, the applicant presented extensive evidence at the hearing over the course of 57 pages of the transcript. However, the applicant only made a short passing reference to this issue at the end of his evidence. Fourth, the applicant did not adduce any documentary evidence that same-sex couples in Mexico cannot legally adopt, which evidence would be necessary to present such a claim. Fifth and finally, the claim is entirely speculative in that the applicant has never tried to adopt in Mexico and has only considered this issue with his new

same-sex partner in Canada. It is speculative in that if the same-sex partnership in Canada is serious, his Canadian partner may decide to sponsor the applicant for permanent residence in Canada as his spouse where they then could adopt. For these five reasons this adoption issue was not properly presented to the Board in order for the Board to be expected to have made a specific finding on the issue.

[16] Under these circumstances, it is not unreasonable or erroneous that the Board's decision did not discuss the issue of adoption.

[17] For these reasons, the application must be dismissed.

[18] Neither party proposed a question for certification. There will be no question certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is dismissed.

“Michael A. Kelen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1883-08

STYLE OF CAUSE: VICTOR FERNANDO MEDINA MORALES v. THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 27, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** KELEN J.

DATED: November 14, 2008

APPEARANCES:

Mr. Michael Korman FOR THE APPLICANT

Ms. Margherita Braccio FOR THE RESPONDENT

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