Federal Court  Cour fédérale

Date: 20090406

Docket: IMM-3861-08

Citation: 2009 FC 351

OTTAWA, ONTARIO, APRIL 6, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

JUAN CARLOS PAGUADA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision made on July 29, 2008, by the Refugee Protection Division (RPD) of the Immigration and Refugee Board. After reviewing the documentary evidence and hearing Mr. Paguada, the RPD concluded that he was not a Convention refugee or person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

FACTS

[2] The applicant, Juan Carlos Paguada, is a citizen of Honduras and was allegedly born on November 12, 1985. He says that he fears members of the Mara Salvatrucha gang because he refused to join them several times.

[3] His problems allegedly started in 1998, when the leader of a gang of Maras asked him to become a member. In 2001, his half-brother was allegedly killed by unidentified persons. Some police officers came to inform the applicant and ask him questions about the murder. Although the police told him that they would contact him again if there were any developments, it seems that they never showed up again.

[4] Between 2003 and 2006, the Maras became more insistent about the applicant joining them. When their leader approached him again on February 10, 2006, to make him his right-hand man, the applicant asked to think about it and took the opportunity to go into hiding at his grandmother's home. When he learned on July 15, 2006, that four men had gone to his great-grandmother's home, where he had left his two children, and asked to see him, he decided to leave the country.

[5] The applicant therefore left Honduras on July 18, 2006, and arrived in Canada on November 4 after illegally crossing the United States for 30 days. He claimed refugee status when he arrived at the border crossing.

IMPUGNED DECISION

[6] The RPD stated that it had not assessed the applicant's credibility at the hearing; even assuming that his story was true, it concluded that his claim for refugee protection could not be accepted because he had not rebutted the presumption that his country was able to protect him.

[7] To reach that conclusion, the RPD basically relied on the fact that Honduras is a democratic country and on the applicant's testimony. The applicant did not seek police protection when he was threatened by the Maras because [TRANSLATION] "it would have served no purpose and the police could even arrest" complainants. In the panel's view, this explanation was not sufficient, and the applicant had to allow the state to provide him with protection before seeking refuge in another country.

[8] The RPD agreed that the situation was not perfect in Honduras but nonetheless found that the civil and military authorities were making serious efforts to protect citizens from threats and assaults and that there was no clear and convincing evidence that the Honduran government would not try to protect the applicant if he returned to his country.

[9] The RPD also rejected the explanations given by the applicant to justify his failure to claim refugee protection in the United States. In the RPD's view, that behaviour was not very consistent with a subjective fear of returning to his country.

ISSUES

[10] This application for judicial review raises three issues: (1) whether the absence of a transcript of the RPD hearing justifies this Court in intervening and referring the matter back to the

RPD for reconsideration; (2) whether the RPD erred in not ruling on the applicant's credibility; and (3) whether the RPD made a reviewable error in concluding that the applicant had not rebutted the presumption that Honduras was able to protect him.

ANALYSIS

[11] At the outset, it is appropriate to say something about the absence of a transcript of the RPD hearing, which was held on June 18, 2007, and March 26, 2008. It seems that the recording of the hearing cannot be found. In his written representations, counsel for the applicant argued that the case should be reheard because it would be impossible for this Court to rule on the arguments that may have been made to rebut the presumption of state protection.

[12] I do not agree. As the Supreme Court of Canada clearly established in *Canadian Union of Public Employees, Local 301* v. *Montreal (City)*, [1997] 1 S.C.R. 793, the absence of a recording is not fatal and does not in itself justify judicially reviewing an administrative decision unless such a recording is required by statute. The principles of natural justice are violated only in cases where the absence of a transcript deprives an applicant of his or her grounds of review:

> 77. Even in cases where the statute creates a right to a recording of the hearing, courts have found that the applicant must show a "serious possibility" of an error on the record or an error regarding which the lack of recording deprived the applicant of his or her grounds of review: *Cameron v. National Parole Board*, [1993] B.C.J. No. 1630 (S.C.), which follows *Desjardins v. National Parole Board* (1989), 29 F.T.R. 38. These decisions are compatible with the test developed by this Court in the criminal context in *R. v. Hayes*, [1989] 1 S.C.R. 44. As I stated for the majority, at p. 48:
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> > A new trial need not be ordered for every gap in a transcript. As a general rule, there must be a serious possibility that there was an error in

> the missing portion of the transcript, or that the omission deprived the appellant of a ground of appeal.
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> . . .
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> 81. 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.

[13] This Supreme Court decision has been followed many times by this Court in immigration cases: see, for example, *Duarte* v. *M.C.I.*, 2003 FC 988, at paragraphs 11-13; *Kandiah* v. *M.E.I.* (1992), 141 N.R. 232 (F.C.A.); *Singh* v. *M.C.I.*, 2004 FC 363, at paragraph 3; *Carrasco* v. *M.C.I.*, 2007 FC 382, at paragraphs 5-7.

[14] In this case, the RPD's decision is not based on an assessment of the applicant's credibility. Moreover, the applicant did not refer to any violation of a principle of procedural fairness during the hearing. The RPD instead rejected Mr. Paguada's claim for refugee protection because of the availability of state protection. In this regard, the record before the Court allows it to properly decide this application for judicial review.

[15] The detailed affidavit filed by the applicant in support of this application, in which he sets out what he allegedly said during the hearing, is essentially to the same effect as the narrative found

in his Personal Information Form. Even assuming that the gist of his testimony before the RPD is accurately reproduced in the affidavit, I see nothing in it that diverges from the facts relied on by the RPD member or is inconsistent with the member's reasoning. Accordingly, I am of the view that the applicant has not shown a "serious possibility" that the absence of a transcript adversely affects him and deprives him of an argument that could justify judicial review.

[16] The applicant also argued that the RPD had erred in not assessing his credibility, since such an assessment was essential to ascertain the merits of the arguments he had made to explain his failure to complain to his country's authorities. Counsel for the applicant also drew the Court's attention to an apparent contradiction in the RPD's reasons for decision; while the member said that he had not assessed the applicant's credibility at the hearing (at paragraph 11), he concluded by writing that there was not a serious possibility that the applicant would be tortured or subjected to a risk to his life or to cruel and unusual treatment or punishment in Honduras "because he was found to be not credible on the fundamental points of his refugee protection claim" (at paragraph 25).

[17] It must be acknowledged that there is at least an apparent contradiction here as regards the applicant's credibility. However, I do not consider this a fatal flaw in the circumstances. Once again, the RPD rejected Mr. Paguada's claim for refugee protection on the sole ground that he had not rebutted the presumption that his country's authorities were able to protect him. This conclusion was determinative. The RPD did not have to rule on the credibility of the applicant's allegations.

[18] The case law of this Court clearly establishes that a claim for refugee protection cannot be accepted once it is determined that protection is available from the state of which the claimant is a citizen. It must never be forgotten that refugee protection substitutes for the protection that a state must normally provide its nationals and that claiming refugee status in a state that has signed the

Convention must therefore always be a solution of last resort: *Canada (Attorney General)* v. *Ward*, [1993] 2 S.C.R. 689. Accordingly, from the time it found that the applicant had not discharged his burden of proving that he could not be protected by the Honduran police, the RPD was perfectly justified in not considering his narrative to assess its plausibility and credibility.

[19] The question of state protection is therefore precisely what remains. It is clearly a question of mixed fact and law and, as such, must be considered by this Court on a standard of reasonableness: see, *inter alia*, *Mendez* v. *M.C.I.*, 2008 FC 584; *Da Mota* v. *M.C.I.*, 2008 FC 386; *Obeid* v. *M.C.I.*, 2009 FC 503; *Naumets* v. *M.C.I.*, 2008 FC 522; *Woods* v. *M.C.I.*, 2008 FC 446.

[20] The applicant basically argued that the RPD had failed to consider his explanations for why he had not sought protection from his country's authorities. Both in his PIF and in his detailed affidavit, he maintained that it would have been suicidal of him to report the Maras to the police and that, in any case, the authorities had not followed through on their investigation into the murder of his half-brother. In the same vein, he criticized the RPD for not taking account of the teachings of *Ward*, above, in which La Forest J. stated that claimants are not required to risk their lives seeking the ineffective protection of a state merely to demonstrate that ineffectiveness.

[21] It is true that, in its reasons for decision, the RPD briefly summarized the applicant's explanations by saying that he had not sought protection "because it would have served no purpose and the police may even arrest people". It must nonetheless be presumed that the RPD considered all the evidence in the record, even if it did not explicitly mention the applicant's exact words. Indeed, I note that the panel referred in its decision (at paragraph 4) to the actions taken by the police after the applicant's half-brother was killed.

[22] Moreover, the evidence in the record shows that the police did not remain inactive after the applicant's half-brother was murdered. First, they informed the family of the tragic event. Even the applicant's PIF states that the police questioned several people at the scene of the crime; since the applicant was unable to answer their questions when he was told the news, the police took the trouble of returning to his home a week later to try and find out who might have had something against his half-brother and why. The fact that the crime could not be solved does not prove that the police are ineffective; as this Court has stressed several times, effectiveness is not measured by perfection, and it would be unrealistic, even in our country, to expect all criminals to be brought to trial. Finally, it is worth noting that, according to the applicant's PIF, the leader of the Maras who allegedly asked him to join them was arrested and imprisoned for five years for burglary.

[23] The applicant is correct to argue that he is not required to risk his life to try to obtain state protection. However, he must prove clearly and convincingly that it would not only have been pointless to request such protection but that he would have made his situation worse by doing so and exposed himself to greater risk. In this regard, the Federal Court of Appeal recently reiterated that a claimant bears both an evidentiary and a legal burden. In other words, the claimant must introduce evidence of inadequate state protection and convince the trier of fact that the evidence adduced establishes that the state protection is inadequate. Furthermore, the evidence must have sufficient probative value to meet the applicable standard of proof, namely the balance of probabilities. Finally, the evidence must be relevant, reliable and convincing. See *M.C.I.* v. *Carrillo*, 2008 FCA 94.

[24] In light of the foregoing, the applicant's subjective fears were therefore not enough to discharge his burden of proving that he could not be protected by the state. The real question the RPD had to ask itself was whether the Honduran authorities were objectively able to protect him and whether it was reasonable for him not to seek such protection before leaving his country. As Justice Michael Phelan stated in *Kim* v. *M.C.I.*, 2005 FC 1126 (at paragraph 10), "subjective reluctance to engage the state in providing protection is not a sufficient basis to conclude that state protection is not available or effective". In light of the evidence in the record, it is my view that the RPD could conclude that the applicant's explanations of why he had not availed himself of the protection of his country's authorities were not sufficient to discharge his burden of proof.

[25] The applicant did not file any evidence suggesting that the police take no action or are powerless when complaints are filed by people who have had problems with the Maras. As noted above, it seems that, on the contrary, the police responded when the applicant's half-brother was killed and that the Maras are not above the law. Moreover, the documentary evidence tends to show that Honduras has taken many steps to counter the gang problem. The RPD assessed that evidence and determined that, although the situation was not perfect, serious efforts were being made to protect citizens from threats and assaults. This conclusion does not seem unreasonable to me.

[26] The RPD correctly stressed the fact that the applicant had done nothing to obtain help and protection. Relying on the decision of the Court of Appeal in *Hinzman* v. *M.C.I.*, 2007 FCA 171, my colleague Justice Barnes reiterated the importance of seeking protection within the home state before claiming refugee protection elsewhere (see *Salazar Santos* v. *M.C.I.*, 2007 FC 793). In this regard, he added that a failure to do so will usually be fatal to a claim for refugee protection, at least where the home state is a functioning democracy with a willingness and the apparatus necessary to

provide a measure of protection to its citizens. In saying this, he echoed what I had stated in another case, which I take the liberty of quoting because of its relevance in the context of this case:

> It may well be that the Board set too exacting a standard when it wrote that the applicant had to exhaust all his remedies. Not only should each case be assessed on its own merits, but it has repeatedly been stated that a claimant is not required to put his life at risk in order to show that he in fact tried to get protection from his country before leaving it. On the other hand, it is reasonable to expect that a person alleging that the authorities were unable to protect him should first have done something that would usually have resulted in their protection. Save in exceptional circumstances, it seems inconceivable to the Court that an applicant should be able to blame the authorities in his country for their inaction when he did not even make them aware of his position of vulnerability and never gave them an opportunity to protect him.
> *Villasenor* v. *M.C.I.*, 2006 FC 1080, at paragraph 19. To the same effect, see also: *Torres Lopez* v. *M.C.I.*, 2007 FC 198; *Lazcano* v. *M.C.I.*, 2007 FC 1242; *Torres Lopez* v. *M.C.I.*, 2007 FC 198

[27] The facts brought to the RPD's attention do not reveal any exceptional circumstances that could justify the applicant's inaction and his failure to make the civil and police authorities in his country aware of his position before seeking refuge in Canada. The RPD could therefore reasonably conclude that he had not discharged his burden of proving that the Honduran state could not protect him; this was one of a "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* v. *New Brunswick*, 2008 SCC 9, at paragraph 47).

[28] Finally, the applicant criticized the RPD for drawing a negative inference from the fact that he had not claimed refugee protection during his 30-day stay in the United States. Although this fact in itself could not be determinative, it was certainly open to the RPD to take it into account in assessing the applicant's subjective fear. In any event, this factor was addressed only in the last

paragraph of the decision and is at most a secondary consideration given the RPD's conclusion about state protection.

[29] For all these reasons, I dismiss the application for judicial review. The parties did not propose any questions for certification, nor does this case raise any.

ORDER

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

"Yves de Montigny"
Judge

Certified true translation

Monica F. Chamberlain

FEDERAL COURT

SOLICITORS OF RECORD

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