Federal Court  Cour fédérale

Date: 20100218

Docket: IMM-3030-09

Citation: 2010 FC 167

Ottawa, Ontario, February 18, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

MARGARITA HERRERA ACEVEDO,
HUGO EFRAIN CANALES MUNGUIA,
NOE MAURICIO CANALES MUNGUIA
AND BRALLAN EFRAIN CANALES HERRERA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision (the decision) of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated May 12, 2009, wherein the Board determined that the Applicants were neither convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, R.S. 2001, c. 27 (*IRPA*).

[2] Based on the reasons below, the application is dismissed.

I. Background

[3] There are four Applicants in this matter. The adult Applicants, Margarita Herrera Acevedo, Hugo Efrain Canales Munguia, and Noe Mauricio Canales Munguia, are citizens of Honduras. Margarita and Hugo are married and Noe is Hugo's brother. The minor Applicant, Brallan Efrain Canales Herrera, is the son of Margarita and Hugo. Brallan is a citizen of the United States.

[4] The adult Applicants claim a fear of persecution at the hands of persons who killed the two male Applicants' father. The family made a denunciation after the killing and the killers were charged and placed in custody. The killers escaped before they were convicted or sentenced. Subsequent to the escape, the family began to receive threats. The three adult Applicants then went to the United States and worked without status. Brallan was born at that time. The Applicants stated they did not apply for protection in the United States as they had heard that many Honduran applicants were rejected. The family came to Canada and applied for protection in 2005.

[5] The Applicants' refugee hearing was held on April 10, 2007. The Applicants were represented by different Counsel at the hearing. Their former Counsel swore an affidavit stating that after the hearing she had an "off the record" conservation with the presiding Board member. During this conversation, the former Counsel was advised that the Board was satisfied and prepared to render a positive decision subject to the Applicants not having status in the United States.

[6] After the hearing, the former Counsel made several requests with United States authorities to confirm that the adult Applicants had no status in America. The former Counsel forwarded these communications to the Board and inquired about a decision, but received no response.

[7] The Board's decision was released on May 2, 2009, and no explanation for the delay was provided. The Board rejected the claims.

[8] As set out in the reasons, the determinative issue was state protection. The Board determined that the corruption of police is not so persuasive that the Applicants would not have had their complaints addressed. The Board also determined that the adult claimants had not taken all reasonable steps to continue to seek state protection in Honduras. The Board made this determination based on the fact that the adult Applicants had not asked for state protection when they received the threats, and therefore they had not discharged their onus of showing "clear and convincing" proof of the state's inability or unwillingness to protect them.

[9] With regard to the minor's application, the Applicants did not make a claim that he was in fear of persecution in the United States. In its decision, the Board determined that there was no evidence that the minor child would be persecuted in the United States.

II. Standard of Review

[10] The issues raised in this matter which relate to state protection or a question of fact will be assessed on a reasonableness standard (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12; [2009] 1 S.C.R. 339). Issues of procedural fairness and abuse of process will be addressed on a standard of correctness.

[11] As set out in *Dunsmuir*, above, and *Khosa*, above, reasonableness requires the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within a range of acceptable outcomes that are defensible in respect of the facts and law.

III. Issues

[12] The Applicants raised the following issues:

(a) Did the Board's delay in issuing the decision prejudice the Applicants?

(b) Did the Board provide insufficient reasons?

[13] Prior to addressing these issues, it is important to discuss the effect of the "off the record" conversation.

[14] In this case, the former Counsel did not take contemporaneous notes of the “off the record” conversation, submit a letter to the Board outlining the conversation, or move to reopen the hearing based on a breach of natural justice under rule 55 of the *Refugee Protection Division Rules*, SOR/2002-228 (see below).

[15] In *Dini v. Canada (Minister of Citizenship and Immigration)*, 1999 Can LII 8339 (F.C.), the Court accepted counsel’s affidavit evidence of an off the record conversation. However, at paragraph 4, Justice Barbra Reed cautioned that relying on submissions that are made to a Board member that are not formally recorded as part of the record is not an appropriate way of proceeding.

[16] The former Counsel did provide an affidavit setting out the “off the record” conversation and was cross-examined on that affidavit. I accept that the conversation took place.

[17] However, the existence of the conversation does not give rise to a breach of procedural fairness. I agree with the Respondent that the Applicants cannot rely on the post hearing “off the record” conversation to create a legitimate expectation of a substantive result (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; [1999] S.C.J. No. 39).

[18] In this case, the Applicants could have applied for the hearing to be reopened under rule 55 of the *Refugee Protection Division Rules*, which mandates that the Refugee Protection Division

must allow the application if it is established that there was a failure to observe a principle of natural justice. Rule 55 is set out thus:

Application to reopen a claim	Demande de réouverture d'une demande d'asile
55. (1) A claimant or the Minister may make an application to the Division to reopen a claim for refugee protection that has been decided or abandoned.	55. (1) Le demandeur d'asile ou le ministre peut demander à la Section de rouvrir toute demande d'asile qui a fait l'objet d'une décision ou d'un désistement.
Form of application	Forme de la demande
(2) The application must be made under rule 44.	(2) La demande est faite selon la règle 44.
Claimant's application	Contenu de la demande faite par le demandeur d'asile
(3) A claimant who makes an application must include the claimant's contact information in the application and provide a copy of the application to the Minister.	(3) Si la demande est faite par le demandeur d'asile, celui-ci y indique ses coordonnées et en transmet une copie au ministre.
Factor	Élément à considérer
(4) The Division must allow the application if it is established that there was a failure to observe a principle of natural justice.	(4) La Section accueille la demande sur preuve du manquement à un principe de justice naturelle.

[19] As set out in paragraph 6 of their Memorandum of Fact and Law, the Applicants' former Counsel relied on this "off the record" conversation with regard to the outcome and did not submit

any further updated information to the Board. As set out by Justice Reed in *Dini*, above, this is not an appropriate way of proceeding. The “off the record” conversation did not create substantive rights that could have been relied on.

A. *Did the Board’s Delay in Issuing the Decision Prejudice the Applicants?*

[20] The Applicants argue that the delay of approximately two years between the hearing and receiving the decision prejudiced the Applicants as the Board made a factual error, relied on old country documentation, and disregarded the torture faced by their father. The Applicants take the position that the delay brought the refugee determination system into disrepute.

[21] The Respondent argues that the Applicants did not demonstrate any prejudice caused by the delay.

[22] In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307; 2000 SCC 44, the Supreme Court held that there may be cases of abuse of process brought about by delay where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute. At paragraph 115, the Supreme Court emphasized that few lengthy delays will meet this threshold.

[23] In *Qazi v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 2069; 2005 FC 1667, Justice Richard Mosley reviewed the case law on delay in the issuance of immigration

decisions. He held that the case law consistently set out that in order to succeed on an application for judicial review, the applicant must demonstrate both that the prejudice had arisen as a result of the delay and that the delay was unreasonable. In *Qazi*, above, Justice Mosley held that the applicant had not demonstrated prejudice from a two year delay in his Pre Removal Risk Assessment decision. At paragraph 23, Justice Mosley stated that one might conclude that the applicant had in fact benefited from the delay as it had resulted in a two year period in which action was not taken against him.

[24] For the following reasons, the Applicants have not demonstrated that they were prejudiced as a result of the delay.

(1) Factual Errors

[25] The Applicants argue that the long delay resulted in the Board member making factual errors and omissions. First, that the Board erred in stating that the father's killers had been convicted and sentenced for the crime. The evidence was that the two men escaped custody during their trial and began to issue death threats against one of the Applicants. Second, that the Board member did not have regard to the evidence of the father's torture, but concluded there was state protection based on improvement in policing petty criminality. The Applicants argue that the Board member's "off the record" comments were a fresh impression of the evidence. They continue that as these comments were different from the decision, it is reasonable to conclude that the member had forgotten the specifics of the case by the time the decision was rendered.

[26] While the Board did make an error in its statements that the alleged killers were convicted and sentenced, this error does not undermine the ultimate conclusion on state protection. I note that in *Ogiriki v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 420; 2006 FC 342, Justice Simon Noël held that Board decisions maybe reasonable even if a few "weaknesses" are identified (see paragraph 13).

[27] The fact that the Board did not place an emphasis on the evidence of the father's torture but on other areas of state policing does not mean that they delay prejudiced the Applicants. The Board has discretion in assessing documentary evidence and is entitled to give some evidence more weight than others (see *Velinova v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 340; 324 F.T.R. 180). A tribunal is assumed to have weighed and considered all the evidence presented to it unless the contrary is shown (see *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.).

[28] I have already stated that the Applicants cannot rely on the "off the record" outcome for a substantive position.

(2) Documentation Package

[29] The Applicants also argue that the delay resulted in the decision being based on dated country condition documentation. The documentation package entered as an exhibit at the hearing

was dated May 2006, and included material from 2001 and 2003. The documentation package in effect at the time of the decision was dated March 16, 2009.

[30] The Respondent argues that the Applicants have not provided specific information, beyond the updated index, that could have resulted in a different decision. Therefore, they argue, the Applicants have failed to show how they were prejudiced by the delay.

[31] At paragraph 12 of their Memorandum of Fact and Law, the Applicants state that the National Documentation Package had been updated and listed three new articles. However, they failed to demonstrate how these articles are different from the previous material. As this is an issue of procedural fairness, the Applicants could have filed affidavit evidence on the matter (see *Qazi*, above, at paragraph 17).

[32] A claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate (*Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94; 69 Imm. L.R. (3d) 309 at paragraph 30). While they may not have been expected to bring the new National Documentation Package to the Board's attention, the Applicants could have submitted additional material on state protection as it became available during the intervening period.

B. *Did the Board Provide Insufficient Reasons?*

[33] The Applicants argue that the Board's reasons were insufficient as they are comprised of a two-and-a half page decision, had no citations, and that the Board did not refer to the documents it preferred over others.

[34] I agree with the Applicants that the Board had a duty to provide reasons (see *Baker*, above, at paragraph 43). The Applicant argues that the Court should follow the line of thinking in *Javed v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1458; 41 Imm. L.R. (3d) 118. In *Javed*, above, Justice John O'Keefe set out the parameters to assess the adequacy of reasons provided by the Board when it dismissed a motion to reopen a claim. At paragraphs 21 and 22 of *Javed*, above, Justice O'Keefe stated:

> [21] My review of the Board's reasons in this case lead me to the conclusion that the reasons were not meaningful or sufficient. From the reasons, I am unable to determine why the Board made that decision, as the reasons only state that the claimants did not show that the decision to declare their claims abandoned breached the rules of natural justice. On judicial review, I cannot assess the reason why the Board came to this conclusion as the reason is not stated in the Board's decision.
>
> [22] The failure to provide meaningful or adequate reasons for the decision is a breach of the duty of procedural fairness and therefore the Board's decision must be set aside and the matter referred to a differently constituted panel for reconsideration.

[35] I note that in *Javed*, above, the Board's reasons were comprised of one sentence.

[36] Based on the parameters set out in *Javed*, above, I do not find the reasons in this matter to be unreasonable. I am able to determine and assess the Board's decision and how it came to this conclusion. There was no breach of the duty of procedural fairness.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. this application for judicial review is dismissed; and

2. there is no order as to costs.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-3030-09**
STYLE OF CAUSE:	**ACEVEDO ET AL. v. MCI**
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