Federal Court		Cour fédérale

Date: 20100505

Docket: IMM-4851-09

Citation: 2010 FC 493

Ottawa, Ontario, May 5, 2010

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

SOMPHONE BOUPHAPHANH
WATDEE BOUPHAPHANH

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. FACTS

[1] The Applicants, husband and wife, who are citizens of Laos, seek a judicial review of a decision by the Immigration and Refugee Board (Board) rejecting their claim for refugee status and protection. The Applicants' claim is based upon the circumstances related to the husband and the wife's claim is entirely dependent upon it.

While the Applicants are citizens of Laos, they have seven children, one of whom is in Canada and is a permanent resident by virtue of marriage.

[2] The principal Applicant claims that he fears the authorities in Laos because he has expressed praise for Canada and the United States, their success and their values and that these comments have attracted the suspicion of the Laotian authorities.

[3] The principal Applicant claimed that he was arrested on November 15, 2005, held for two weeks but not mistreated and that when he was released, he was warned to cease his criticism of the government or risk severe punishment.

[4] Upon his release from incarceration, the principal Applicant was successful in applying for a three-month exit visa securing a letter of recommendation from the Ministry of Labour and Social Welfare.

[5] Within approximately a month of arriving in Canada, the Applicants applied for their refugee status. The refugee claim under s. 96 was based upon the fear expressed regarding support for Canadian and U.S. success values and it was the basis for the majority of the s. 97 claim. However, added to the arguments before the Board and before this Court was an allegation that the principal Applicant feared cruel and unusual punishment under s. 97 on the basis that they had overstayed their exit visa.

[6] The Applicants have raised two legal issues in respect of the Board's decision as well as a challenge to the credibility findings in respect of inconsistencies in the testimony. The issue of

credibility was not strongly advanced in this Court, nor should it have been. Those findings are subject to considerable deference and would not have been successful in any event.

[7] The Applicants' basis for the allegation of error by the Board rests on the finding contained in paragraph 24 of the Board's reasons which reads as follows:

> The PC correctly pointed out that I must examine their claims under section 97(1) of the *IRPA*. However when I have found the PC to be not credible, I am not obliged to conduct a thorough analysis under section 97 of the *IRPA*. The counsel in a submission states that because the PC stayed past the time allowed, upon return he is likely to face cruel and unusual treatment or punishment. First of all, the burden is on the counsel and the PC to show that, it is more likely than not, the PC upon return will be arrested and if so, the punishment given to the PC will be so excessive to outrage the standards of decency. The PC or the counsel has not provided evidence to support that the PC will be arrested upon return to Laos and that he will be given cruel and unusual treatment or punishment.

[8] The Applicants assert that there are two errors in this paragraph:

(1) The finding that there was no obligation to perform a s. 97 analysis in the face of an adverse credibility finding; and

(2) That to satisfy s. 97, the Applicant was required to show that he would be arrested upon return and subject to cruel and unusual treatment or punishment.

II. ANALYSIS

[9] The issues raised by the Applicants are questions of law and subject to the correctness standard. Absent a finding of an error of law, the issue of whether the onus had been met

sufficiently to satisfy the Board is a question of mixed law and fact and subject to the reasonableness standard (*Ayilan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1328).

As indicated earlier, credibility findings are subject to greater deference and judged on a reasonableness standard (*Aguebor v. (Canada) Minister of Employment and Immigration (F.C.A.)*, [1993] F.C.J. No. 732; [1993] 160 N.R. 315).

[10] The Applicants placed considerable reliance on Justice Blanchard's comments in *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211, and in particular, in regard to the following comments:

> **41** … There may well be instances where a refugee claimant, whose identity is not disputed, is found to be not credible with respect to his subjective fear of persecution, but the country conditions are such that the claimant's particular circumstances, make him/her a person in need of protection. It follows that a negative credibility determination, which may be determinative of a refugee claim under s. 96 of the Act, is not necessarily determinative of a claim under subsection 97(1) of the Act. …
>
> [Emphasis added]

[11] The Applicants argue that the Board Member, even in the face of the adverse credibility finding, was obliged to engage in a s. 97 analysis. Also, they further rely on a decision of *Grama v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1030 at paragraph 8:

> **8** In situations where the Board feels a claim has been exaggerated, it must still determine whether there is sufficient evidence to justify a well-founded fear of persecution. …

> It seems to us that the Board should have asked itself whether, even assuming some exaggerations, the applicant had not shown that he had been undoubtedly the victim of harassment of a variety of forms amounting to persecution, making thereby his fear to go back *[sic]* not only genuine but objectively founded.

[12] In my view, the Board did exactly what was referred to both in *Bouaouni*, above, and in *Grama*, above, in that the Board found that given the nature of the evidence in front of it, there was no reason to do a “thorough analysis” under s. 97. What the Board did was underscore the obligation that rests with an applicant to provide evidence to support a s. 97 analysis.

[13] Justice Layden-Stevenson in *Brovina v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 635, summarised the state of the law which I adopt:

> **17** These authorities, in my view, do not demand that a section 97 analysis be performed in every case. Rather, it will be required in some cases. It is a question that must be reviewed on a case by case basis. If there is evidence before the board to support a section 97 analysis, the analysis must be conducted.

[14] The Applicant put forward no evidence upon which to base the s. 97 analysis with respect to his fear of persecution arising from his comments. The Applicant did not raise enough evidence to warrant a s. 97 analysis.

[15] With respect to the question of the test under s. 97 and whether the Applicant was required to show that he would be arrested upon return, this related, presumably, to the fact that the

Applicants had overstayed their exit visas. The Applicants put in no evidence as to what the consequences might be for overstaying the exit visa, and there was no other objective evidence on this point other than the fact that the requirement for an exit visa had recently been revoked. The only consequence that the Applicant had referred to in respect of his dealing with Laotian authorities was his arrest in 2005. The Board's comments with respect to proving that he would be arrested must be read in the context that the only consequence ever raised by the Applicant was that of arrest.

[16] Therefore, I find that the comments with respect to this test being "that it is more likely than not" that the Applicant would be arrested upon return, is not an error in the circumstances of this case. While it is easy to suggest that it would be better if the Board had given more fulsome reasons, that type of comment could be made about virtually every decision maker.

[17] To the extent that there were any problems with respect to the Board's decision, I would adopt the comments of Justice Blanchard in *Bouaouni*, above, where he says at paragraph 42:

> … However, in the circumstances of this case and in the exercise of my discretion, I also find that the error is not material to the result. I find that the Board's conclusion, that the applicant was not a "person in need of protection" under paragraphs 97(1)*(a)* and *(b)* of the Act, was open to it on the evidence.

III. CONCLUSION

[18] For all these reasons, this judicial review will be dismissed. There is no question of general importance for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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