Federal Court  Cour fédérale

Date: 20110120

Docket: IMM-3422-10

Citation: 2011 FC 68

Toronto, Ontario, January 20, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

FRANCISCO JAVIER (JAVIE) MELO SANCHEZ
GUADALUPE MARITZA ALTAMIRANO CANCHOLA
(A.K.A. GUADALUPE MARIT ALTAMIRANO CANCHOLA)
ERICK MELO ALTAMIRANO
IVAN MELO ALTAMIRANO

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*") of the decision of the Refugee Protection Division of the Immigration and Refugee Board ("Board"), dated May 19, 2010, wherein the Board Member determined that there was no credible basis to the claim and that the applicants were not Convention refugees or persons in need of protection. For the reasons that follow, the application is

granted and the matter will be remitted to the Board for a fresh hearing and determination by a different panel.

I. Background

[2] The applicants are citizens of Mexico. They claim a fear of harm if returned to Mexico due to the actions of members of the federal police who allegedly harassed, kidnapped, assaulted, extorted and threatened them. A first occurrence in August 2007 involving the principal male applicant, Mr. Sanchez, and his father was not reported to the local authorities, they say, due to concerns about repercussions. A further incident on June 26, 2008 involving Mr. Sanchez and his wife, Mrs. Canchola, was reported to the municipal police because threats of violence were extended to the minor children of the family and Mrs. Canchola insisted upon a report being made. The municipal police allegedly refused to include in the report that the applicants' assailants were federal police officers.

[3] The day following the June 26, 2008 incident, additional threats were made because of the filing of the police report and Mr. Sanchez was abducted. Mrs. Canchola paid a ransom for his release. Shortly thereafter, their home was broken into, valuables stolen and a threatening message was left behind. The family, which had first visited Canada in December 2006, chose at that point to return to this country and filed a claim for protection following their arrival.

II. Decision Under Review

[4] The hearing of the claim took place on April 19, 2010 and April 23rd, 2010 with Mr. Sanchez and Mrs. Canchola testifying through interpreters. The Member’s decision was issued on

May 19, 2010. He did not believe the applicants. Rather, he found them to have "embarked on an elaborate scheme to fabricate a story around police corruption". He thus rejected the applicants' s. 96 claim and found there to be no other persuasive evidence that would indicate that the applicants are, on a balance of probabilities, subject to the risks enumerated under s. 97 of the *IRPA*. The Member found that there was no credible or trustworthy evidence on which a favourable decision could be made and, pursuant to subsection 107(2) of the *IRPA*, stated that there was no credible basis for the claim. As set out in his reasons, the Member's conclusions were based on a series of plausibility findings arising from the applicants' testimony.

III. Issues

[5] The issues on this application are:

1. Did the Member's conduct of the hearing give rise to a reasonable apprehension of bias?
2. Were the Member's negative credibility findings reasonable?

IV. Analysis

Reasonable Apprehension of Bias

[6] In reviewing an administrative decision by a board or tribunal, the Court must begin with the presumption that the decision-maker is impartial. An allegation of bias or of a reasonable apprehension of bias questions the fairness of the proceeding. If the applicants were denied fairness, no deference is due and the decision is invalid: *Cardinal v. Kent Institution*, [1985] 2 SCR 643; *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003]1 SCR 539.

[7] There is no direct allegation of bias in this case. The applicants contend that the Member's demeanour was less than appropriate during the hearing. They say certain comments displayed skepticism about their claim and belittled their evidence. Because of this, the applicants submit that they did not have a fair opportunity at the hearing.

[8] A reasonable apprehension of bias may be raised where an informed person, viewing the matter realistically and practically and having thought the matter through, would think it more likely than not that the decision maker would unconsciously or consciously decide the issue unfairly. The grounds must be substantial. A real likelihood or probability of bias must be demonstrated: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369, *R. v S(R.D.)*, [1997] 3 SCR 484, 118 CCC (3d) 353.

[9] Having read the transcript of the two days of the hearing and having considered the applicants' written representations and oral submissions, I am satisfied that there are insufficient grounds on which this Court could find that there is a reasonable apprehension of bias arising from the Member's conduct of the hearing.

[10] There were some sharp exchanges between the Member and the interpreter on the first day of the hearing over a delay in starting the proceedings, the timing of breaks and the unavailability of water in the hearing room. The Member expressed his frustration at these matters and stated, "I must confess I don't think that today's my best day, but I'm going to give it my best shot." The Member also closely examined Mr. Sanchez over the details of the claim and indicated some impatience with the applicant's failure to articulate responses to questions. This prompted an

intervention by counsel. Nothing of a similar nature occurred during the examination of Mrs. Canchola on the second day of the hearing.

[11] I agree with the applicants that a member "having a bad day" should not take it out on claimants. It is clear that the Member was frustrated on the first hearing day by a delay in the start of the proceedings which he seems to have attributed to the interpreter. This was compounded by the interpreter's requests for breaks and by the lack of any provision for water in the hearing room. From my reading of the transcript, I am satisfied that any frustration the Member experienced was not directed at the applicants. I note that the hearing proceeded more smoothly on the second day when Mrs. Canchola testified and the applicants' submissions were presented by counsel.

[12] The Member was somewhat abrupt in instructing Mr. Sanchez to give a verbal answer to questions but it appears to have been necessary to clarify his testimony. Mr. Sanchez responded to some questions with non-verbal utterances which the interpreter could not translate. I agree with the respondent that members must be allowed reasonable latitude in questioning a claimant. Extensive and energetic questioning alone will not give rise to a reasonable apprehension of bias: *Bankole v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1581 at para 23; *Kankanagme v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1451, 259 FTR 268 at para 19.

[13] Looking at the hearing as a whole, I am satisfied that an objective observer would not have concluded that the Member would be unlikely to decide the matter fairly.

The reasonableness of the Member's negative credibility findings

[14] Much deference is owed to the triers of fact in judicial reviews of refugee protection claims. Their decisions are subject to the reasonableness standard of review. It is trite law that Board Members are in the best position to gauge the plausibility and credibility of a claimant's account: *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, 42 ACWS (3d) 886 (FCA) at para 4; *Aguirre v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 571 at para 14.

[15] Members are entitled, as was recognized by the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 47, to make findings that fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. However, the Court has a duty to interfere when findings of credibility are based on erroneous findings of fact made in a perverse or capricious manner without regard for the material before it: *Valtchev v. Canada (Minister of Citizenship and Immigration)* (2001), 208 FTR 267 at para 5.

[16] This is not a case in which the Member's credibility findings are based on inconsistencies between the evidence of the claimants and their prior statements or the documentary record. They are solely based on the Member's assessment of the plausibility of the applicants' accounts. Unfortunately, the Member failed to justify these implausibility findings in his reasons and drew conclusions that are not defensible based on the oral and documentary evidence.

[17] In one instance, the Member found an inconsistency in the fact that Mr. Sanchez did not report the first incident to the police but did report the second incident. The explanation given by the

applicants was that the reason they went to the police the second time was because their children had been threatened. This explanation was found to be "vague, confusing and inconsistent with common sense and rationality". In view of the documented evidence of corruption within Mexican police agencies that was before the Member, including evidence of cases in which other victims had not reported such incidents, and the applicants' explanation as to why they viewed the second incident differently it is difficult to see how this could be said to be inconsistent with a rational response to such events.

[18] The Member made implausibility findings with respect to the fact that the applicants filed a police report with the municipal police concerning an incident that allegedly took place involving members of the federal police. This in itself should not have been considered implausible as the municipal police are the police with jurisdiction in Mexico to investigate offences such as assault and robbery. It is also understandable that the applicants may not have wished to file their complaint with the agency to which the perpetrators allegedly belonged.

[19] The Member characterized Mr. Sanchez' testimony that the police said that they would inform him if they found something as a result of their inquiries as "confusing and inconsistent with common sense and rationality". He questioned why the municipal police would bother to offer to inform the applicants of anything they might find if they refused to include a reference to the federal police in their report. Again, it is not clear from the Member's reasons why this is implausible. The municipal police response as described by the applicants is not outside the realm of possible responses one would expect to hear from a police officer to someone who has just made a police

report, even where the police may have been reluctant to include a reference to their federal counterparts.

[20] The Member found it "odd" that Mr. Sanchez was kidnapped instead of his wife as he was the one who had a good job. When Mrs. Canchola was asked why her husband was kidnapped and not her, she said she did not know. The Member drew a negative inference from this but provided no rationale for why it was implausible.

[21] The police report states that the second incident occurred on June 26, 2008. The first translation of the report submitted to the Board contained an error, placing the incident two years earlier. This was quickly found and corrected in a revised version submitted to the Board. This is indicated by a change on the translated copy with the translators name next to the fixed date. The Member found that the police report was "confusing, unclear and untidy". The translator's error should not have been used to question the applicants' credibility.

[22] The Member found that there was no persuasive evidence that the 2007 incident took place because there was no police report. He discounted a letter from Mr. Sanchez' father describing the incident. The fact that there was no police report for the first incident does not undermine the claim in the circumstances of this case. It is consistent with the applicants' story that they feared repercussions if they reported the first incident and that they sought immediate protection from the police when they felt an increased threat and sense of fear from the second incident. Moreover, the father's letter described how he and his wife had moved their city of residence out of fear as a result of these threats. The letter, while self-serving, had some corroborative value. The Member erred, in

my view, in determining that there was no persuasive evidence that the 2007 incident took place without assigning any weight to the letter.

[23] The Member's finding that there was no credible or trustworthy evidence on which a favourable decision could be made, and that there was therefore no credible basis for the claim, failed to take into account the documentary evidence before the Member with respect to police corruption, criminality and impunity in Mexico. Even if it had been open to the Member to find that the applicants were not credible on sound plausibility reasoning, taking all of the documentary evidence into account, including the 2008 police report, it was not reasonable to conclude that there was no credible or trustworthy evidence in support of the claim.

[24] The Member's conclusion that the applicants "embarked on an elaborate scheme to fabricate a story around police corruption" was not well founded on a careful review of their oral testimony or the documentary evidence. The findings do not fall within a range of possible, acceptable outcomes that are defensible on the facts and the law and so the decision must be overturned.

[25] No serious questions of general importance were proposed by the parties and none will be certified.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is granted and the matter is remitted to the Board for a fresh hearing and a new determination by a differently constituted panel. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3422-10
STYLE OF CAUSE:	FRANCISCO JAVIER (JAVIE) MELO SANCHEZ; GUADALUPE MARITZA ALTAMIRANO CANCHOLA ; (A.K.A. GUADALUPE MARIT ALTAMIRANO CANCHOLA); ERICK MELO ALTAMIRANO; IVAN MELO ALTAMIRANO v. MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 19, 2011
REASONS FOR JUDGMENT AND JUDGMENT BY:	MOSLEY J.
DATED:	JANUARY 20, 2011

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