Federal Court  Cour fédérale

Date: 20110420

Docket: IMM-5296-10

Citation: 2011 FC 460

Ottawa, Ontario, April 20, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

ALVARO SALCEDO REYES

Applicant

and

THE 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*, SC 2001, c 27 (*IRPA*) of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated July 5, 2010, wherein the Board determined that the applicant was not a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *IRPA*. The Board found that the determinative issue for the decision was the applicant's credibility.

[2] The applicant is a citizen of Columbia and was born on July 18, 1986. He arrived in Canada on November 4, 2009 and applied for refugee protection because of his fear of reprisals by the Revolutionary Armed Forces of Columbia (the FARC).

[3] In 2001, the applicant's mother received threats from the National Liberation Army (ELN), which asked her for contributions. When she refused to pay them, they replied by stating that they knew where her son went to school and where they lived. At his mother's insistence the applicant fled to the United States in 2002 to live with relatives in Miami. His mother remained in Columbia, but moved from place to place.

[4] The applicant entered the U.S. on a tourist visa that was valid from May 10, 2000 to May 4, 2005, where he remained until August, 2005. Although he entered as a tourist, the applicant completed high school while in the U.S.

[5] The applicant returned to Columbia in 2005 when his mother thought that it was safe for him to do so. The applicant then began to work with Maria Victoria Vargas who was a city councillor, a member of the Liberal Party, and a friend of his father, who was also an active Liberal Party member. The applicant helped at Ms. Vargas' office and worked with local youth. Through his work, the applicant claimed that he encouraged youth to focus on their studies and not to join to the FARC.

[6] As a result of this work the applicant was contacted by two members of the FARC in June 2008. They told him to stop working in a FARC controlled neighbourhood (Ciudad Bolivar) and to stop working with the Liberal party.

[7] The applicant discussed this incident with Ms. Vargas, his father, and his mother. All of them encouraged him to be careful and so the applicant moved apartments and went into hiding.

[8] The applicant then left for the U.S. in September 2008, where he remained until he came to Canada in November 2009. The applicant decided to leave the U.S. and come to Canada because his mother, by then an American resident, could not sponsor him and his chances for asylum were slim because of his previous stay in the country.

Decision Under Review

[9] The Board characterized the applicant as a member of a particular social group (his family) who were perceived as having a political opinion which is contrary to the interests of the FARC because of his father's involvement, and his own work, with the Liberal Party. This culminated in an encounter the applicant claimed he had with two members of the FARC in June 2008, who told him to stop his political activities.

[10] The Board found that the determinative issue was the applicant's credibility. The credibility finding was the product of inconsistencies, a lack of evidence and negative inferences.

[11] The Board found that the applicant did not demonstrate a subjective fear. The crux of Board's decision in this regard was based on the fact that the applicant spent three years, from

February 2002 to August 2005, in the U.S. without applying for asylum. Moreover, the applicant's mother, when faced with threats from the ELN, remained in Columbia and did not encourage her son to apply for asylum in the U.S. The applicant's mother also did not report this incident to the authorities. As such, the Board found that the actions taken by the applicant, his mother, and his guardians in the U.S. during his stay there from February 2002 to August 2005 did not show that either he or his mother had a credible fear of the ELN.

[12] The Board accepted that the applicant worked for the Liberal Party, but was concerned that he had not provided adequate evidence about his work, and therefore found that his political involvement was not credible.

[13] The Board also drew a negative inference from the fact that the applicant's father did not send a letter detailing his son's political activities, especially considering that the applicant's father is a lawyer who is heavily involved with the Liberal Party. The applicant told the Board that his father had sent a letter and that he had received it shortly before the hearing and didn't have time to get it translated.

[14] The Board also considered the fact that there was no evidence of complaints made to the police or any authorities, and drew a negative inference from the applicant's failure to solicit state protection. Indeed, the Board found that it did not appear that the applicant took the threats seriously.

[15] The Board concluded that the applicant's lack of credibility and lack of subjective fear meant that the applicant did not satisfy the requirements for refugee protection. The claim was rejected.

Analysis

[16] The determinative issue in this case is credibility. The Board's finding on credibility is well within the Board's expertise, and, as such, should be reviewed using the reasonableness standard of review: *Plaisimond v Canada (Citizenship and Immigration)*, 2010 FC 998 at para 30; see also *Triana Aguirre v Canada (Citizenship and Immigration)*, 2008 FC 571 at para 14.

[17] Although rendered prior to the decision of the Supreme Court of Canada (SCC) in *Dunsmuir v New Brunswick* [2008] 1 SCR 190, 2008 SCC 9, Justice Rouleau's observations in *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2004 FC 808 at para 23, remain relevant:

> It has been consistently held by our courts that the Board has well established expertise when it comes to determining questions of fact and in particular assessing the credibility of asylum seekers. In fact, the assessment of the facts constitutes the cornerstone of the Board's jurisdiction. As the trier of facts, the Board is the body that is in the best position to draw reasonable findings as to the credibility of the claimant's story, basing itself on improbability, common sense and reason.

[18] A departure point for a credibility analysis is the understanding that the Board must accept sworn testimony as truthful, unless there is good reason to doubt its veracity: *Maldonado v Canada (Min of Employment and Immigration)* [1980] 2 FC 302, [1979] FCJ No 248. However, this presumption is always rebuttable, particularly by the failure of the documentary evidence to

mention what one would normally expect it to mention: *Adu v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 114 at para 2 (FCA). Finally, when the Board makes a negative credibility finding, it must explain these findings in "clear and unmistakable terms": *Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 228 (FCA); *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA). This deference, however, does not extend to circumstances where the Board has overlooked a key factual element of the claim, or conflated otherwise separate events or discreet elements of the evidence into a single conclusion, as occurred here.

[19] The Board erred in its assessment that the applicant lacked subjective fear because he failed to claim asylum in the U.S. The Board based this finding on the fact that the applicant fled to the U.S. and lived with relatives from 2002 to 2005, when he was approximately 15 to 18 years of age, and then he returned to Columbia. The reason that that applicant fled to the U.S. was because his mother had been threatened by the ELN, which had specifically made threats regarding her son.

[20] The applicant's flight to the U.S. because of his fear of the ELN is not the same as the fear of FARC that forms the basis of the applicant's current application for refugee protection. The fear of FARC was a new fear that was formed upon his return to Columbia in 2008, as a result of his political involvement. On the evidence before the Board, the origins and nature of the risk to the applicant were substantively different. The applicant did not fear the FARC when he went to the United States. The applicant did not intend to claim status when in the U.S. This was the evidence before the Board. The Board erred in equating the two fears as being the same and stating that the applicant should have sought asylum at the time of first stay in the U.S.

[21] This error is illuminated by the fact that the Board did not discuss the fact that the applicant spent time in the U.S. when he fled Columbia a second time in 2008. The applicant, in his affidavit, stated that he went to the U.S. upon leaving Columbia in September 2008 and stayed until November 2009. However, the applicant explained that he did not seek asylum because he had received advice that he was too old to be sponsored by his mother (now an American resident) and would not be successful in seeking asylum. The Board did not consider this information, which was pertinent and, based on the Board's discussion of this issue at paragraph 20 of the decision, it is not clear whether the Board fully understood that the applicant went to the U.S. in 2008.

[22] While it is true that the evidence must be assessed as a whole and all evidence must be assessed in light of other evidence, this does not equate to licence to merge, or otherwise conflate discreet events, substantively different in nature, into a single determination. Moreover, as a result of the failure to advance a claim, the Board drew negative inferences about the applicant's credibility. The Board considered this finding to be material and significant to its determination of the applicant's subjective fear of the FARC. It referenced the failure to claim in the U.S. on two occasions. This finding is, in light of the error noted, unsupportable.

[23] The application for judicial review is granted and the matter remitted to a differently constituted panel of the Board.

[24] There is no question to be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the matter remitted to a differently constituted panel of the Board. No question for certification has been proposed and none arises.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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