

Federal Court



Cour fédérale

Date: 20110608

Docket: IMM-6497-10

Citation: 2011 FC 653

Ottawa, Ontario, June 8, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

GUSTAVO MENDEZ LOPERA

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated October 7, 2010, concluding that the applicant is not a Convention refugee or person in need of protection pursuant to sections 96 or 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act) because the applicant was not credible and did not have a subjective or objective fear of persecution in Colombia.

FACTS

Background

[1] The applicant, a citizen of Colombia, arrived in Canada with his mother on February 3, 2009, and claimed refugee protection. He was 16 years old at the time (his birth date is April 23, 1992). His claim was joined to the claims of his sister, Andrea Catalina Mendez Lopera, and her husband and daughter.

[2] The applicant testified that he fears persecution by the Revolutionary Armed Forces of Columbia (FARC), who have targeted him as a result of his relationship to his mother and sister.

[3] In 2004, the applicant's sister, a physiotherapist, along with her mother and other medical professionals, registered a foundation, FUNDEPRO, to provide healthcare and social services to underserved people in the family's region of Colombia, Tolima. Their organization was involved, among other things, in a government vaccination campaign in the area. In the course of carrying out the vaccination campaign, the applicant's sister was kidnapped, along with other members of her organization, by the FARC. The FARC wanted the sister's medical services for the FARC "guerrillas". All but one of them was subsequently rescued by the Colombian army.

[4] In the months following the abduction, the applicant's sister's foundation began to be regularly targeted by the FARC. They were the subject of threats, including a time when their premises was raided and their medical equipment stolen, and attempts to recruit them to work for

the FARC. Although the applicant's mother contacted Colombian authorities, they could only suggest that the organization cease its activities in rural areas.

[5] As a result of these threats, the applicant's sister and mother fled to Bogota, where they attempted to hide. While there, they learned that the FARC had ransacked their foundation offices, kidnapped one of the doctors to work for them, and specifically declared the applicant's sister and mother to be FARC targets sentenced to die.

[6] Because of the highly credible threats, the applicant's sister was forced to flee Colombia, leaving her sick daughter and husband at home. In June of 2004, she fled to the United States, and was joined by her daughter and husband four months later. She remained in the US illegally until 2008, when she came to Canada and made the claim to which the applicant's claim was originally joined.

[7] Meanwhile, the applicant, his parents, and his younger sister went into hiding in the municipality of Cundinamarca in Colombia. The applicant's father was a retired Colombian police officer, and insisted that they would not leave their country as a result of threats from guerrillas. Moreover, the applicant's younger sister suffered from severe medical problems that made it impossible for her to leave Columbia.

[8] After spending two years in hiding, the applicant's father determined that they were unlikely to remain targets of the FARC. As a result, the family returned to their hometown. They were not disturbed.

[9] After another two years, the applicant's mother decided to reopen the foundation, which the applicant stated she did in December of 2008. On December 16, 2008, the applicant stated that a Christmas party hosted by the foundation was raided by the FARC, who took all of their cash, medical equipment, and computers, and told the applicant's mother that they would have to pay a monthly sum of 2000 million pesos to the FARC.

[10] The applicant advanced his planned move to Bogota, where he was enrolled in a university for studies in marine biology. His parents thought he would be safe in Bogota. On December 29, 2008, the applicant stated that his mother received a telephone call threatening the lives of the entire family, including the applicant, should she fail to pay the money that they had demanded.

[11] The applicant's father conceded the danger and his parents moved to Bogota, where they hoped to hide. They needed, however, to return regularly to their hometown in order to see the applicant's younger sister, who was hospitalized in a clinic there.

[12] On January 13, 2009, the applicant's sister was discharged from hospital. The applicant's parents therefore decided to move the entire family to Bogota on a permanent basis. As a result, they rented an apartment, to which they intended move on January 15, 2009. When they arrived at the apartment, however, they discovered that it had been ransacked, and inside was a condolence card from the FARC with each of the family member's names on it. The applicant's mother therefore arranged for herself and the applicant to come to Canada. His father remained in Colombia to be with his sister, who was unable to leave because of her medical condition. Instead, the family moved the applicant's younger sister to a clinic in Cali that could treat her. The applicant's mother

returned to Colombia to visit her husband and sick daughter, but was in Canada on a visitor's visa at the time this application was made.

Decision under review

[13] In a decision dated October 7, 2010, the Board rejected the applicant's claim for refugee protection, but accepted the claims of the applicant's sister and her husband and daughter. With regard to the applicant, the Board found that the applicant was not credible and that he did not have a subjective or objective fear of persecution in Colombia:

¶11. The determinative issues in this case are credibility, including subjective fear and whether the claimant's fear of persecution at the hands of the FARC has objective basis should he return to Colombia today. In assessing this claim, the panel considered the claimant's sister's oral and written evidence, counsel's written submissions and all of the documentary evidence entered as exhibits at the hearing.

[14] The Board stated the law with regard to determinations of a claimant's credibility. It recognized that there is a presumption that testimony made under oath is true, unless there is a valid reason to doubt its truthfulness, and stated that "the real test" of credibility is whether the testimony accords with "the preponderance of probabilities". It held that it had to be persuaded that the evidence is "probably" credible, and not just "possibly" so.

[15] First, with regard to subjective fear, the Board found that the applicant did not have a subjective fear of persecution based upon his sister's activities because he had remained in Colombia for four years after his sister fled, and his parents, despite being subject to the same threats as those made against the applicant, remain in Colombia, where his father continues to operate a taxi business.

[16] The Board further found that the applicant did not have a subjective fear based upon his claim of renewed threats following his mother's re-opening of the Foundation in 2008, because the Board found that his mother had not, in fact, re-opened the Foundation. The Board doubted that the Foundation had been re-opened by the applicant's mother because it found that there was no documentary evidence in support of either the re-opening, or of the subsequent threats or related incidents.

[17] The Board rejected the applicant's explanations as to why he did not have the documentary evidence. The Board found that because it has been one year since he fled Colombia, and because the applicant's father has remained in Colombia throughout that time, the applicant should have been able to obtain documentary evidence of the re-opening of the Foundation.

[18] The Board also rejected the applicant's description of the ransacking of the apartment in Bogota and the "condolence card" that the applicant stated was left there. Again, the Board found that the absence of documentary evidence was problematic, and was not satisfied with the applicant's explanations for why he did not have corroborating documents. The panel concluded that the applicant's story was fabricated, and, therefore, that he did not face a subjective or objective fear of persecution in Colombia:

¶21. Therefore, based on the evidence adduced, the panel is not persuaded to believe that the claimant's family moved to Bogota into a rental apartment as alleged and the panel disbelieves that FARC vandalized their apartment in Bogota. The panel finds that the claimant has fabricated his story about the re-opening of the Foundation and being threatened by the FARC for non-payment of extortion to bolster his refugee claim in Canada. The panel finds that the FARC was only interested to harm the claimant's sister and other medical professionals who worked with her at the FUNDEPRO for not providing their services to wounded guerrillas.

LEGISLATION

[19] Section 96 of the Act, grants protection to Convention refugees:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[20] Section 97 of the Act grants protection to persons whose removal from Canada would subject them personally to a risk to their life, or of cruel and unusual punishment, or to a danger of torture:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle

have a country of nationality, their country of former habitual residence, would subject them personally	a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

ISSUES

[21] The applicant's submissions raise the following two issues:

- a. Did the Board fail to consider relevant evidence?
- b. Did the Board err in drawing a negative inference from the lack of corroborating documentary evidence in the applicant's claim?

STANDARD OF REVIEW

[22] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to “ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question”: see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at para. 53.

[23] *Dunsmuir* and *Khosa* establish that issues of fact or mixed fact and law are generally to be reviewed on a standard of reasonableness. The Board’s determinations of credibility and of fear of persecution are to be reviewed on a standard of reasonableness: *Wu v. Canada (Citizenship and Immigration)*, 2009 FC 929, at para. 17; *Aguirre v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 571 at para. 14.

[24] In reviewing the Board's decision using a standard of reasonableness, the Court will consider “the existence of justification, transparency and intelligibility within the decision-making process” and “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir*, supra, at paragraph 47; *Khosa*, supra, at para. 59.

ANALYSIS

Issue 1: Did the Board fail to consider relevant evidence?

[25] The applicant submits that the Board erred by drawing negative inferences from some facts without regard to the applicant's explanations for them. In particular, the Board concluded that the applicant did not have a subjective fear of persecution in part because the applicant and his parents remained in Colombia. The applicant submits that in so concluding, the Board ignored the applicant's testimony and written submission regarding his unique family circumstances, including his father's determination to stay and his younger sister's medical condition that prevents her from traveling. Moreover, both the applicant and his sister had testified that their mother no longer lives in Colombia, but frequently visits. The applicant submits that his parents' circumstances do not undermine his own fear of persecution or the well-foundedness of his fear.

[26] The respondent submits that the Board was reasonable in finding that the fact that the applicant and his parents remained in Colombia after his sister fled, and that the applicant's parents continue to live and work in Colombia is inconsistent with a subjective fear of persecution.

[27] The Court agrees with the applicant that the Board failed to consider the whole of the evidence which explains why the applicant and his parents remained in Colombia. In particular, the Court finds that the Board ought to have considered that the applicant's parents remained in Colombia to care for his very sick sister, who was in a medical centre and medically unable to travel by airplane. The Board also failed to consider that the applicant's family remained in hiding for two years, or ultimately fled their hometown, both of which showed a subjective fear of persecution. Also the Board failed to recognize that the applicant was only 12 years old in 2004, and not in a position to leave his parents.

[28] Despite these oversights, however, the Court finds that the Board's statements regarding the behaviour of the applicant and his parents were not determinative of the applicant's claim. In fact, the applicant himself testified that his family had believed that by hiding for years following his sister's departure they would be safe. The applicant testified that it was only once threats resumed after his mother re-opened the Foundation that the family determined that they all had to flee. Thus, the determinative issue was the Board's finding that the applicant had not been targeted by the FARC since his sister fled, and that his story of his mother's re-opening the foundation and subsequent threats including the ransacking of the apartment, were fabricated.

Issue 2: Did the Board err in drawing a negative inference from the lack of corroborating documentary evidence in the applicant's claim?

[29] The applicant, relying *Ahortor v. Canada (Minister of Employment & Immigration)*, (1993), 65 F.T.R. 137 (Fed. T.D.), submits that the Board could not draw a negative inference from the mere fact that the applicant failed to produce any extrinsic documents to corroborate his story of the re-opening of the Foundation in 2008 or the threats that followed. The applicant submits that the Board further erred by failing to consider the applicant's sister's testimony, which corroborated the applicant's story.

[30] The respondent submits that it is open to the Board to draw a negative inference from the fact that the applicant did not have documents that he could be expected to have, and did not have satisfactory explanations for their absence. The respondent quotes *Ortiz Juarez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 288, at paragraph 7, where Justice Phelan stated that "The requirement for corroboration is only a matter of common sense." In this case, the Board

sought the applicant's explanations for the absence of any documentary corroboration, and rejected those explanations as not credible.

[31] Whether corroborative evidence can reasonably be demanded depends upon the facts of each case. In *Juarez*, Justice Phelan found that the corroborative evidence could reasonably have been expected to be available to the applicants in that case, and so the Board in that case was reasonable to draw a negative inference as a result of its absence. In contrast, in *Ahortor* the Board impugned the applicant's credibility on the basis of inconsistencies that were not supported by the evidence in that case. The Board in *Ahortor* failed to consider the applicant's explanations for the apparent inconsistencies, and Justice Teitelbaum found that the Board had provided no valid reason for doubting the applicant's credibility: *Ahortor* at paragraphs 43 and 44.

[32] In this case, it was reasonable for the Board to expect some corroborating evidence. The Board stated that the applicant's sister had extensive documentation regarding her involvement in the founding and operation of the Foundation, and regarding the threats and attacks that she had experienced. In contrast, the Board noted that there was no documentary evidence whatsoever of the applicant's mother re-opening the Foundation, the family's rental of the apartment in Bogota, or the threats apparently received by the family thereafter. The Board considered the applicant's explanation for the absence of such documents—namely that he and his mother had fled in such a hurry that they could not obtain them—but found that these explanations were “vague” and not reasonable. The Board held that given the fact that the applicant's father remains in Colombia, they should be able to get some documentation.

[33] While it is true that the Board failed to consider the corroborating testimony of the applicant's sister, the Court finds that the sister's testimony on these points was no different from the applicant's. The sister provided no additional information or explanation, and her evidence was hearsay. As a result, the Court finds that the Board's failure to specifically recognize that his sister had corroborated the applicant's testimony is not an error.

[34] The ransacking of the apartment and the "condolence card" would have been documented if true. Especially not having the condolence card is a gapping hole in the applicant's story – it is the "smoking gun" which should have been produced.

CONCLUSION

[35] The Board stated that the determinative issue before it was credibility, and found that the applicant had fabricated the central elements of his claim to have a fear of persecution in Colombia—namely, the fact that his mother had re-opened the Foundation and that his family had subsequently been threatened as a result. Although the Board failed to consider some evidence on subjective fear, this was not the determinative issue. The Court therefore has no basis upon which to intervene.

CERTIFIED QUESTION

[36] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review is dismissed.

“Michael A. Kelen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6497-10

STYLE OF CAUSE: *Gustavo Mendez Lopera v. The Minister of Citizenship and Immigration*

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 24, 2011

REASONS FOR JUDGMENT AND JUDGMENT: KELEN J.

DATED: June 8, 2011

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