

Federal Court



Cour fédérale

Date: 20110622

Docket: IMM-4759-10

Citation: 2011 FC 744

Ottawa, Ontario, June 22, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

**JORGE EDUARDO PINA GAETE
MARIA TERESA SILVA RIQUELME
JORGE ADRIAN PINA SILVA
YERKO MICHEL PINA SILVA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are a family from Santiago, Chile. Their refugee claim was based on a risk to their lives or of serious harm from a gang of drug dealers. The father and principal applicant (“male applicant”), travelled to Canada on March 4, 2005. The mother (“female applicant”), together with the applicants’ children, came on October 10, 2007. The male applicant made an unsuccessful

attempt to obtain sponsorship through his employer. The family then filed for refugee status on March 8, 2008.

[2] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“IRPA”) of the decision made on July 15, 2010, by the Refugee Protection Division of the Immigration and Refugee Board wherein the applicants were found not to be Convention refugees or persons in need of protection.

[3] The Board concluded that the applicants did not satisfy the burden of establishing a serious possibility of persecution on a Convention ground, or, that they would personally be subjected, on a balance of probabilities, to a danger of torture, or of a risk to life or a risk of cruel and unusual treatment or punishment if returned to Chile. The Board found the male applicant and female applicant’s evidence not to be credible and drew negative inferences from a lack of corroborating evidence, as well as the male applicant’s three-year delay in claiming protection.

ISSUES

[4] This application raises the following questions:

- 1) Were the Board’s credibility findings reasonable?
- 2) Did the Board reasonably conclude that the male applicant had a lack of subjective fear due to his 3-year delay in claiming protection?

ANALYSIS

Standard of Review

[5] A reviewing court may not substitute its opinion for that of the decision-maker and can only interfere with a board's findings of fact, including credibility findings, if the board's decision was erroneous, made in a perverse or capricious manner or without regard for the material before it: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(4)(d); *Diabo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1772 at para. 3; *Chavarro v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1119 at para. 24. The Board is in the best position to gauge the credibility and plausibility of a refugee claimant's story, as well as the factual evidence that comes before it: *Aguebor v. Canada (Minister of Employment and Immigration) (F.C.A.)*, [1993] F.C.J. No. 732 (QL), 160 N.R. 315.

a. *Were the Board's credibility findings reasonable?*

The Male Applicant's Credibility

[6] The Board made a negative credibility finding from the fact that there was documentary evidence to support the male applicant's involvement in the scout movement between 1988 and 1998 but nothing to show that he was engaged in activities past that point and especially in 2004 when the alleged anti-drug campaign was said to have taken place. Moreover, there was an absence of any persuasive evidence indicating that there was an anti-drug campaign at all. A letter from an individual claiming to be a leader of the scout group was in evidence. It confirmed his earlier involvement.

[7] The applicants rely on the case of *Mahmud v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 729 (QL), 167 F.T.R. 309 for the proposition that a board must

consider letters for what they say, not for what they do not say. In *Mahmud*, however, the letters submitted had the purpose of establishing the applicant's membership in a social group, namely the Jatiya Jubo Sanghati, which was the youth wing of the Jatiya Party in Bangladesh. They also appeared to show that charges had been laid against him on account of his political involvement. This is distinguishable from the case at bar where the purpose of submitting the letter regarding the scout movement appears to have been to demonstrate Mr. Pina Gaete's involvement in that movement during the time of the purported anti-drug campaign. It did not do this.

[8] A board or tribunal may discount the weight of a letter if it fails to address vital aspects of a claim: *Lebbe v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1239, 118 A.C.W.S. (3d) 872 at para. 8.

[9] Here, the letter submitted by the applicants reads as follows:

I hereby certify that Mr. Jorge Eduardo Pina Gaete, with ID No. [...], actively worked with our group from 1988 to 1998, as a Troop Assistant.

During this period of time, Mr. Pina proved to be a very responsible person who abided by the values and principles of the Scouts movement.

I am writing this letter at the request of the interested party and for all the legal purposes that he may deem appropriate.

[10] There is no reference in this letter to an anti-drug campaign. It was therefore open to the Board to make a negative credibility finding from the lack of evidence pointing to the existence of such a campaign and/or the male applicant's involvement in it. Given how central this was to the applicants' refugee claim, the Board's conclusion was reasonable.

[11] The applicants also take issue with the fact that the Board did not believe the applicant had gone to see the drug gang leader El Cholo or that his son, Jorge, had been assaulted by El Cholo's son. The Board noted that the applicant did not report his son's assault to the police and concluded that there is no persuasive evidence that the assault took place. Second, the Board found the male applicant's testimony with respect to how he knew El Cholo to be confusing and inconsistent with commonsense and rationality:

Mr. Pina said he did not know El Cholo before he went to see him, so why did he need to "gather strength" to go and talk to a child's parent since he didn't know at the time that the child's father was a drug dealer? Bearing in mind the child is only 13 years old. The panel notes the answer Mr. Pina gave when he was asked, how long have you known El Cholo, he said at the time I went to speak to him. How did you know he was a drug trafficker; he was well known all over the neighbourhood as a drug trafficker. The panel finds the response confusing and inconsistent with commonsense and rationality, for if El Cholo was a well known drug trafficker in the neighbourhood, how could he not have known him when he testified that everybody knew him. As such, the panel rejects the allegation that his son was assaulted and he went to see the assailant's parents.

[12] In light of the inconsistent testimony given by the male applicant with respect to how he knew El Cholo, together with the lack of any evidence that might corroborate the 2004 assault, it was reasonable for the Board to reject the allegation that Jorge was assaulted and that the male applicant went to see the assailant's parents.

[13] It was also open to the Board to conclude the applicant was evasive and not straight forward in his responses to the line of questioning that revolved around whether he followed up with the police after his house had come under attack. Seeing as the Board is in the best position to assess credibility and plausibility of a claimant's story and from reading the transcript on this point, this finding is one that fell within the wide range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47.

[14] In oral testimony, the applicant said he received four threatening notes between February and March, 2005. However, when asked where the notes were, he said they “disappeared, they got lost. I never kept them”. No mention was made of these notes in his personal information form (“PIF”) and when asked why not, the applicant responded that it never occurred to him that they would be important. They were also not reported to the police when there was an on-going police investigation. It was not unreasonable for the Board to find that there were no notes and to reject the allegation that they were left under the door of the applicant’s house.

[15] It was also reasonable for the Board to accept that the applicant’s son was attacked and his video camera stolen but to conclude that it had nothing to do with El Cholo. First, there was no evidence to suggest that it did; and second, it was the mother of one of the assailants, Jorge Ojeda Miranda, the wife of El Cholo, who returned the camera. The Board reasonably concluded that it was inconsistent with common sense and rationality that the wife of El Cholo, “this dangerous drug dealer”, would return a camera that their son had stolen.

The Female Applicant’s Credibility

[16] The Board did not believe the female applicant when she said she discovered that her telephone line was tampered with. This was because the female applicant testified that the police had checked her phone and found that it was not working. The Board held that if there was tampering with the line the police would have discovered it when they checked the phone.

[17] In another instance, the female applicant testified that her son continued to be harassed up until 2006 because of his involvement in the scout movement. But, as the Board rightly noted, this was inconsistent with the male applicant's testimony, which she explicitly supported. The male applicant had testified that things had calmed down a couple of months after he left Chile in 2005. Her evidence surrounding the violent robbery of her son, and her explanations for why she opened, closed and re-opened the investigation file were also reasonably held to be inconsistent, confusing and implausible.

[18] The applicants submit that the Board committed serious reviewable errors in finding that the female applicant was not sexually assaulted. They base this on the fact that the Board questioned the timing of when she screamed for help during the alleged assault and that she did not call the police to report it. However, these findings must be read in the context of the Board's assessment of the female applicant's credibility. Examining the decision as a whole shows that the Board's analysis on this point was reasonable.

[19] The principal applicant's personal narrative, also attached to the female applicant's PIF, explained that she yelled for help and two men came to her rescue. Other evidence suggested it was dark, during winter and there were no people on the street because it was so late at night. It was therefore reasonable for the Board to question from where these two men who rescued her suddenly came.

[20] The Board also found that not calling the police or allowing the two men who allegedly rescued her to call the police undermined her credibility. Although refugee claimants cannot always

be expected to report sexual assaults, in the circumstances of this case, it was open to the Board to question what occurred in this instance.

[21] The female applicant had called the police a number of times when she feared for her children's safety. They checked in on the children and interacted with the female applicant on several occasions. She also reported the stolen camera to them. Although this does not necessarily imply that she should have reported the assault, it does offer perspective with respect to the relationship the female applicant had with the police, namely, one with open lines of communication and at least some level of ease. It was thus open to the Board not to believe that the reason the female applicant did not report the sexual assault was because she was scared.

[22] The Board demonstrated an awareness of the *Gender Guidelines* by noting that not every victim of sexual assault will seek medical attention or report the matter to the police. In any event, the credibility finding with respect to the female applicant was based largely on other factors such as her support for her husband's account and inconsistencies between the two of them.

2) *Did the Board reasonably conclude that the male applicant had a lack of subjective fear due to his 3-year delay in claiming protection?*

[23] The jurisprudence has established that the delay of a refugee claim is related to the existence of a subjective fear of persecution: *Heer v. Canada (Minister of Employment and Immigration)*, [1988] F.C.J. No. 330 (QL) (FCA); *Espinosa v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324 at para. 16 and 21. A long delay points to a lack of subjective fear.

[24] Here, the Board was justified in concluding that the male applicant's substantial delay in making a refugee claim undermines his allegation that he and his family face serious harm in Chile if they were to return. The male applicant arrived in Canada in March 2005 and filed for refugee status only in March 2008, only after he sought sponsorship through a company with which he was employed, and that avenue failed. It was reasonable for the Board to question his explanation that he did not know he could seek refugee status and to conclude that the male applicant lacked subjective fear.

[25] No questions were proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4759-10

STYLE OF CAUSE: JORGE EDUARDO PINA GAETE
MARIA TERESA SILVA RIQUELME
JORGE ADRIAN PINA SILVA
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and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 22, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** MOSLEY J.

DATED: June 22, 2011

APPEARANCES:

D. Clifford Luyt FOR THE APPLICANT

Nur Muhammed-Ally FOR THE RESPONDENT

SOLICITORS OF RECORD:

D. CLIFFORD LUYT FOR THE APPLICANT
Barrister & Solicitor
Toronto, Ontario

MYLES J. KIRVAN FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario