Federal Court

Cour fédérale

Date: 20110822

Docket: IMM-1247-11

Citation: 2011 FC 1013

Ottawa, Ontario, August 22, 2011

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

WILFREDO ANGULO BELALCAZAR

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Wilfredo Angulo Belalcazar, joined the Autodefensas Unidas de Columbia (AUC), a terrorist organization, after he was told that he “owed them,” presumably for losing one kilogram of their cocaine when he was arrested and eventually imprisoned for importing that cocaine into the United States.

[2] In July 2009, he fled to Canada and was almost immediately apprehended. Shortly afterwards, the Minister reported him for inadmissibility under the *Immigration and Refugee*

Protection Act, SC 2001, c 27 (IRPA). This led to an admissibility hearing before the Immigration Division of the Immigration and Refugee Board.

[3] Ultimately, the Board found that the Applicant had not established the defence of duress to the degree required by law, but rather was a voluntary member of the AUC. Accordingly, it issued a Deportation Order pursuant to paragraph 229(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[4] The Applicant submitted that the Board erred by:

i. failing to address a number of elements of the legal test of duress;

ii. failing to address certain evidence that did not support its conclusion; and

iii. failing to provide adequate reasons to support a plausibility finding that it made.

[5] For the reasons that follow, this application will be dismissed.

I. Background

[6] The Applicant is a citizen of Colombia. In 2001, he was convicted in the United States of possession with intent to distribute 500 grams or more of cocaine and was imprisoned for approximately two years. On his release in April 2003, he was deported to Mexico and soon made his way back to his hometown of Buenaventura, Colombia.

[7] Shortly after his return, he joined the Autodefensa Bloque Calima del Pacifico, a regional chapter of the AUC, after being told that he had to join their organization. The AUC is a listed terrorist organization under section 83.05 of the *Criminal Code*, RSC 1985, c C-46.

[8] The people from whom the Applicant received orders in the AUC contacted him almost every day to give him instructions or to arrange meetings which were held several times each week. At the first meeting, he was told that his job would be to threaten, kidnap and murder FARC members and sympathizers. He then put threatening notes under people's doors on numerous occasions, indirectly participated in two kidnappings, and was involved in approximately 10 confrontations at people's homes, where he "had to shoot people along with other group members who were there." However, he stated that he always shot to miss and didn't think he hurt anyone.

[9] In December 2003, the Applicant stopped participating in the AUC's activities. Fearing for his safety, he fled the area with the help of two friends. He went into hiding with his aunt, but was caught when he returned to his home to visit his sick mother. Members of the AUC then tied him up and tortured him for 10 days before he was able to escape by prying loose a rotting board in the wall and jumping into the water below.

[10] The Applicant then fled again, this time to the United States. In 2009, when American officials were cracking down on illegal aliens, he decided to come to Canada to stay with a friend, who had told him that he could claim refugee protection here.

[11] Shortly after being arrested at a bus station in Calgary, two days after his arrival in Canada, he claimed refugee protection and disclosed that he had lived and worked illegally in the United States, had been convicted and imprisoned for possessing the cocaine described above, and had been involved with a group in Colombia whose name he did not remember.

[12] On May 25, 2010, the Applicant voluntarily disclosed his involvement with the AUC.

II. The Decision under Review

[13] The Board rejected the Applicant's defence of duress on the basis that he had not acted in a manner that is consistent with the fear of imminent physical peril. In addition, the Board found that his story about how he escaped from the AUC after he was found and allegedly tortured by them was "simply not plausible".

III. Standard of Review

[14] The issue that the Applicant has raised with respect to whether the Board erred by failing to address a number of the elements of the legal test of duress is reviewable on a standard of correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 44).

[15] The issue that the Applicant has raised with respect to the Board's failure to address certain evidence that did not support its conclusion is reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 51-55; *Thiyagarajah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 339, at para 16). In short, the Board's treatment of the evidence will stand so long as it falls "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" and is sufficiently justified, transparent and intelligible (*Dunsmuir*, at para 47).

[16] In reviewing the issue that the Applicant has raised with respect to the adequacy of the Board's reasons in relation to an adverse plausibility finding that it made, I must determine whether those reasons: (i) focused on the factors that must be considered in the decision-making process; (ii) enable the Applicant to exercise his right to judicial review; and (iii) enable me to conduct a meaningful review of the Board's decision (*Canada (Minister of Citizenship and Immigration) v*

Ragupathy, 2006 FCA 151, 53 Imm LR (3d) 186, at para 14). Stated differently, I must determine whether the reasons adequately explain "what" was decided and "why" the decision was made (*Law Society of Upper Canada v Neinstein*, 2010 ONCA 193, 99 OR (3d) 1, at para 61; *Clifford v Ontario Municipal Employees Retirement System*, 2009 ONCA 670, 98 OR (3d) 210, at para 40).

IV. <u>Analysis</u>

A. *Did the Board err by failing to address one or more elements of the legal test for duress?*

[17] The Applicant submits that, after correctly stating the legal test of duress, the Board erred by failing to address a number of the elements of that test, as set forth in the applicable jurisprudence and in article 31 of the *Rome Statute of the International Criminal Court*, December 18, 1998, Can TS 2002 No 13, 2187 UNTS 90 (entered into force July 1, 2002) [the *Rome Statute*].

[18] I disagree.

[19] With respect to the elements of the legal test of duress, I agree with the Respondent that the three main elements of the test are conjunctive (see *Oberlander v Canada (Attorney General)*, 2009 FCA 330, 83 Imm LR (3d) 1, at paras 25-36; *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306, 89 DLR (4th) 173, at para 40; *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, 252 DLR (4th) 316, at para 52; see also Article 31(1)(d) of the *Rome Statute*, in particular the word "and" between the first and second elements of the test). In brief, each of those elements must be met to satisfy the defence of duress. Stated differently, the failure to satisfy any one of those elements will be fatal, and upon finding that any element has not been satisfied, the Board will not be obliged to proceed to address the remaining elements.

[20] The Respondent submitted that, even if it is assumed that the Board accepted that threats of death or serious bodily harm to the Applicant or to members of his family were made by the AUC, it was not unreasonable for the Board to conclude that the Applicant had not established the required element of "imminence" of such death or serious bodily harm.

[21] I agree. The determination made by the Board with respect to the element of duress was based upon the following findings:

i. The Applicant testified that he had been a member of the AUC for approximately 5 months, during which time he participated in approximately 10 shootouts;

ii. When he made his decision to leave the AUC, the Applicant "simply stopped taking their calls and moved to his Aunt's house;"

iii. The Applicant continued to visit his mother at the residence where AUC members had previously met him, and where he testified they eventually found him again after he left their organization; and

iv. By returning to a location where AUC members would know he could be found, the Applicant had not acted in a manner that is consistent with the fear of imminent physical peril.

[22] I am satisfied that the language used by the Board in stating these findings was an acceptable way of paraphrasing and applying the proper legal test with respect to the element of "imminence" in the test of duress.

[23] In my view, those findings were sufficiently justified, transparent and intelligible to support the Board's conclusion with respect to the imminence element of the test of duress. Given those findings, that conclusion fell well within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[24] Having reasonably concluded that the Applicant had not satisfied the "imminence" element of the test for the defence of duress, the Board was not required to proceed to consider the other two conjunctive elements of that test, including the proportionality element. Moreover, the Board was not required to consider whether the alleged threats had in fact been made by the AUC, or other persons, or was constituted by other circumstances beyond the Applicant's control.

[25] On the facts of this particular case, the Board also did not err by failing to address the possibility that the Applicant joined the AUC to, at least in part, protect other members of his family. The uncontested evidence was that the AUC knew where his mother lived, yet never harmed her – or any other members of his family – in any way, even though his mother and aunt continued to live in their respective homes throughout the relevant period. The fact that, after he was captured by the AUC, his mother was threatened with harm if she contacted the police is irrelevant to whether a reasonable person living in Colombia, at the time the Applicant joined the AUC, would have believed that his family members would be seriously harmed if he did not join that organization.

B. *Did the Board err by failing to address certain evidence?*

[26] The Applicant submitted that the Board erred by failing to consider, in concluding that he had not established the defence of duress, evidence he had adduced with respect to: (i) the torture that he allegedly suffered at the hands of the AUC; (ii) the country documentation that reported

upon the strength and unity of the AUC within Columbia, its ties to the Colombian government, its forced recruitment of young people, and the terror it instilled in Colombia at the relevant time; (iii) the Applicant's fear that the AUC would kill or seriously harm members of his family if he did not join them; and (iv) the alleged murder of two of his friends at the hands of the AUC.

[27] In my view, once the Board found that the Applicant had not acted in a manner consistent with a fear of imminent physical peril, it was not necessary for the Board to consider this evidence. In short, the finding that the Applicant had not acted in a manner consistent with a fear of imminent physical peril was a sufficient basis upon which to reasonably conclude that he had not established, from an objective perspective, that he held such a fear when he joined and remained with the AUC.

[28] I acknowledge that the language used by the Board in the first sentence in paragraph 19 of its decision clearly reflected a conclusion regarding the Applicant's subjective state of mind. However, contrary to the Applicant's submissions, I am satisfied that the language used by the Board in the remaining sentences of paragraph 19 (which is set forth at paragraph 21 above), reflect that it had concluded that a reasonable person living in Colombia at that time would not have "apprehend[ed] that he was in such imminent physical peril as to deprive him of the freedom to choose the right and refrain from the wrong" with respect to his decision to join the AUC (*Ramirez*, above). In making this finding, the Board was effectively rejecting the Applicant's claim that such a reasonable person would have joined and remained with the AUC, as he did, out of the fear of death or imminent physical peril.

[29] In stating that the Applicant had participated in about 10 shootouts, had been a member of the AUC for approximately 5 months, had simply stopped communicating with the AUC and moved to his aunt's house when he made his decision to leave the AUC, and had returned to a

location where the AUC knew they could find him, the Board was effectively stating, in a transparent and intelligible manner, that the Applicant had not been under a risk of imminent physical peril or death during his time with the AUC. At no time did the Applicant testify or adduce any evidence to suggest that he was "under constant watch" during that time and could not have effected "a carefully planned desertion" from the AUC (see *Valle Lopes v Canada (Minister of Citizenship and Immigration)*, 2010 FC 403, at para 108).

C. *Did the Board err by failing to provide more detailed reasons with respect to a plausibility finding that it made?*

[30] The plausibility finding made by the Board with respect to the Applicant's story regarding how he escaped from the AUC after they tortured him, was made after the Board articulated its conclusion on the determinative element of the imminence of the Applicant's fear of death or imminent physical peril. Accordingly, that finding was *obiter dictum*. While the Board may have erred by failing to provide more detailed reasons with respect to this finding, that error was not material to the outcome of the Applicant's admissibility hearing.

D. *Did the Board err by failing to conduct a more detailed assessment of whether the Applicant was a "member" of the AUC?*

[31] The Applicant did not contest the Board's statement, at paragraph 2 of its decision, that the AUC is a listed entity designated by Order-in-Council PC 2003-456, dated April 2, 2003 under section 83.05 of the *Criminal Code*. Moreover, the Applicant stated in the addendum to his Personal Information Form that he "joined" the AUC and subsequently "left" that organization. In my view, it was not unreasonable for the Board to proceed with its analysis on the basis of the view that the Applicant was a member of a terrorist organization, as contemplated by paragraph 34(1)(f) of the IRPA, without conducting a more comprehensive assessment of whether in fact the Applicant was a

"member" of such an organization. The Applicant's failure to address this point in its written submissions precluded him from raising the issue for the first time at the oral hearing before me.

V. Conclusion

[32] The application for judicial review is therefore dismissed.

[33] At the end of the oral hearing, the Applicant's counsel proposed the following question for certification: "Is it reasonable for the Board to make a finding that the defence of duress has not been established, based solely on a finding that the Applicant faced no threat of imminent death or physical peril?" In my view, this is not a serious question, as the answer to the question is obvious from a plain reading of the jurisprudence and the *Rome Statute*. Accordingly, no question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Paul S. Crampton"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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