Federal Court  Cour fédérale

Date: 20111019

Docket: IMM-1842-11

Citation: 2011 FC 1187

Ottawa, Ontario, October 19, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

ROGELIO ALFREDO ZAPATA RIVAS,
YOHANNA VELAZQUEZ ARZATE,
RUTH VANESA ZAPATA VELAZQUEZ

Applicants

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 January 31, 2011, that the applicants are not Convention refugees or persons in need of protection pursuant to sections 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), because the applicant was not credible and the applicants have adequate state protection in Mexico.

FACTS

Background

[2] The principal applicant, Rogelio Alfredo Zapata Rivas (the applicant), was born on May 14, 1981. He married Yohanna Velazquez Arzate on June 3, 2003, and the couple had a daughter, Ruth Vanesa Zapata Velazquez, on August 3, 2003. The wife and daughter's claims were based on the claim of the applicant.

[3] The applicant states in his Personal Information Form (PIF) that he graduated from the police academy as a Federal Police Officer in April 2008. He states that he was selected to form part of the Cobra Elite Group, which was created to combat drug trafficking. As a part of this group, he states that on November 23, 2007, he and his fellow officers arrested three high-profile drug dealers.

[4] The applicant states that after these arrests, he began receiving threats. He states that on January 2, 2008, his police car was shot, and a threatening note was left on it. He states that on January 4, 2008, his partner was killed and a photo of the applicant's family was left at the scene with a note saying they were next.

[5] The applicant states that a threatening letter was sent to his family's home on January 30, 2008. He states that they also began receiving threatening phone calls at their family home. In June 2008, he states that their home was ransacked while no one was there. The applicant also states that his wife was followed sometimes picking up their daughter from school.

[6] The applicant states that, eventually, 17 out of the 19 officers in the Cobra Elite Group were murdered. He states that in February 2009, his living quarters were ransacked. He states that he sought protection from his superiors but none was forthcoming.

[7] The applicant states that in May 2009, he and his partner were abducted and put in the trunk of a car. He states that they were able to escape, but his partner was shot while they were running away. He stopped working for the Federal Police in September 2009.

[8] The applicants fled Mexico and arrived in Canada on September 26, 2009. They made their claims for refugee protection on November 27, 2009. The applicants attended a hearing before the Board on December 13, 2010.

Decision under review

[9] In the lengthy reasons for its decision, dated January 31, 2011, the Board found that the applicants were not Convention refugees or persons in need of protection. The Board recited the background facts alleged by the applicant. The Board's analysis was divided into two sections: credibility with respect to subjective fear, and state protection.

Credibility with respect to Subjective Fear

[10] The Board recited the relevant law on credibility: testimony given under oath is presumed to be true, unless there is a valid reason to doubt its truthfulness. The testimony must be in harmony with the preponderance of probabilities which a practical and informed person would readily

recognize as reasonable. The Board noted it must be satisfied that the evidence is probably true, and not just possibly so.

[11] The Board stated that it believed the applicant was a federal police officer and may have been assigned to a unit called the Cobra Elite unit. However, the Board stated it did not believe that he was involved in high-profile arrests of drug dealers, and that as a result he and his family were threatened and his partners killed. The Board found that the applicant's story was based on exaggerations and embellishments designed to bolster his claim.

[12] The Board drew a negative inference because the applicant could not recall the date the Cobra Elite unit was formed. He stated in his testimony that it was a month after his graduation, but he also did not remember the precise date of his graduation.

[13] The Board stated that it found it illogical for the same officers to gather intelligence through undercover policing and then also carry out the operations. The Board stated it questioned the applicant further on this issue, and the applicant could not provide specifics regarding how the unit conducted investigations or operations.

[14] The Board also found it implausible that the three drug dealers would have been sought by police for three years, but the applicant's unit was able to track them down and arrest them within 15 days of obtaining warrants for their arrest. The Board found this story improbable and that it lacked sufficient detail to be believed. The Board further noted that the applicant provided no documentary evidence to support this story, and made no effort to acquire it.

[15] The Board recounted the applicant's allegations of threats and actions against him and his family, and rejected them all as exaggerations and embellishments. The Board noted that the applicant had given contradictory evidence regarding the date that he began receiving threats.

[16] The Board found that the documentary evidence in support of the allegations was not persuasive: the photos, supposedly of his murdered partner and his police car, were accorded no weight because there was no evidence that they showed what the applicant claimed they showed. The Board likewise rejected the handwritten threatening notes as embellishments by the applicant, and rejected the claim that a photo of his wife was taken by criminals stalking her, because she appeared to be posing and smiling for the photo.

[17] The Board rejected the applicant's testimony that he informally reported the threats to his superiors. The Board found it implausible that his superiors would tell him not to worry if so many of his fellow officers were being murdered. The Board was unsatisfied with the applicant's explanation for waiting over a year to make a formal report regarding the threats.

[18] The Board also found it implausible that, if it was apparent that there was an informant working with his unit, and as a result 17 officers were killed, no action would be taken against this person. The Board found there would have been efforts to find and take action against such a person if they existed.

[19] As a result of these findings, the Board found a general lack of credibility with respect to subjective fear on the part of the applicant.

State Protection

[20] The Board reviewed the relevant law on state protection: in the absence of complete state breakdown, there is a presumption that a state is capable of protecting its citizens. In order to rebut this presumption, the claimant must provide clear and convincing evidence of the state's inability to protect. The Board noted that the onus is on a claimant to approach the state for protection in situations where protection might be reasonably forthcoming.

[21] The Board found that the applicant had not provided clear and convincing evidence that state protection in Mexico was inadequate. The Board recounted the applicant's testimony regarding the efforts he made to seek informal protection from his superiors, and their alleged response that nothing would happen to him. The Board noted he made a formal report in February 2009, and the police responded by telling him to report the threats to the local police station where he resided. The Board noted that there was no evidence the applicant took this advice; rather, the applicant continued working for the police force until September 2009, and then fled Mexico one week later.

[22] The Board found that the applicant's testimony that there would be no protection available to him was contradicted by documentary evidence before it. The Board reviewed evidence of the initiatives to reduce corruption, reform the security forces, and combat drug cartels and organized crime. The Board also noted mechanisms to complain about police misconduct or seek an investigation of corruption. The Board found, based on the evidence, that Mexico provided adequate

though not perfect protection for its citizens. The Board acknowledged problems with criminality and corruption, but found that Mexico was making serious efforts to address those problems.

[23] The Board concluded that the applicant had failed to rebut the presumption that state protection was available to him. The Board found that the applicant's claim failed, as did the other two claims, because they were based on the applicant's claim.

LEGISLATION

[24] Section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (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,	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) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	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) 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	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.

[25] 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 have a country of nationality, their country of former habitual residence, would subject them personally	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 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 themself 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

[26] Based on the parties' submissions, the Court finds that the following issues are raised:

a. Was the Board's conclusion regarding credibility unreasonable?

b. Was the Board's conclusion regarding the availability of state protection unreasonable?

STANDARD OF REVIEW

[27] 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 (Minister of Citizenship and Immigration)*, 2009 SCC 12, per Justice Binnie at paragraph 53.

[28] Questions of credibility and whether the applicants rebutted the presumption of state protection are questions of mixed fact and law, to be reviewed on a standard of reasonableness. 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*, above, at paragraph 47; *Khosa*, above, at paragraph 59.

ANALYSIS

Issue #1: Was the Board's conclusion regarding credibility unreasonable?

[29] The applicants submit that the Board erred when it stated that the applicant "may have been assigned" to the Cobra Elite unit – they submit that the Board must give clear and unmistakable reasons for rejecting credibility, and must not use ambiguous statements that cast doubt but fall short of outright rejection of credibility: *Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ 228. The applicants also submit that the Board later contradicts itself by stating that it does not believe the applicant was assigned to such a unit.

[30] The applicants submit that there was nothing implausible in the following parts of the applicant's story that the Board found implausible:

a. 17 out of 19 officers in the unit were murdered: the applicants submit there was ample documentary evidence to prove that this was plausible.
b. The officers in the unit carried out both investigations and operations: the applicants submit the Board did not give notice of any specialized knowledge about police procedure to ground this implausibility finding.
c. The three drug dealers were arrested by the applicant's specialized unit within 15 days of the issuing of warrants, after police had sought them for three years: the applicant submits there was documentary evidence brought to the Board's attention about police corruption that prove it is plausible for the police not to take action against these individuals for so long.

[31] The applicants further submit that it was unreasonable for the Board to draw a negative inference because the applicant could not recall the date the unit was formed. The applicants submit that the Board must not engage in a microscopic analysis of the evidence, and by doing so here the Board committed an error: *Attakora v Canada (Minister of Employment and Immigration)* (1989), 99 NR 168.

[32] The applicants submit that the Board also erred by not stating its reasons for rejecting the threatening notes adduced by the applicant.

[33] The applicants also submit that the Board's conclusion that the applicant did not report the threats to his superiors is contradicted by the evidence before it – specifically, the police's response to the applicant. The applicants further submit it was an error to dismiss this piece of evidence without justification, and it was an error to refer to the police response as 'alleged', which is not a clear finding regarding whether it is credible. The applicants further submit that the Board relied on the police response, after impugning its credibility, which is also an error.

[34] Finally, the applicants submit that the Board erred by finding the applicant's story regarding a possible informant in his unit implausible. The applicants submit that it would not have been possible to take action against the informant when his or her identity was unknown; therefore, the Board's conclusion on this point was unreasonable.

[35] The respondent submits that the Board rejected the applicant's credibility in clear and unmistakable terms, and that it explained why it rejected his credibility. The respondent further

submits that the Board's initial comment that the applicant may have been assigned to the Cobra Elite unit reflected its initial suspension of disbelief before reviewing all the facts. Thus, it was not inconsistent for the Board to ultimately conclude that the applicant was not assigned to such a unit.

[36] The respondent submits that the applicants presented no evidence to support the assertion that 17 out of 19 officers in the unit were murdered. The respondent submits that the Board considered the evidence adduced in support of the applicant's story, and it was reasonable to reject that evidence as not persuasive. The respondent notes in particular that evidence of the death of the applicant's partner was inconsistent with his testimony about his partner, and therefore was not capable of corroborating his story.

[37] The respondent submits that the Board was entitled to reject the applicant's description of the unit's operations, and of the infiltration by an informant, as implausible. The respondent submits that the Court cannot re-weigh the evidence properly considered by the Board.

[38] In response to the applicants' argument that the Board made contradictory use of the police response to the applicant's formal report, the respondent submits that in fact its analysis was not contradictory. After according little weight to the police response, the Board further expanded on why the applicant's account of his attempt to seek protection was implausible and inconsistent with the evidence.

[39] The Court is not persuaded that the Board's conclusion regarding the applicant's credibility was unreasonable. The applicants' submissions that the Board was wrong to find several parts of the

story implausible amount to a request to re-weigh the evidence before the Board, which is not the proper purview of the Court.

[40] The Court agrees with the respondent that the Board made a clear finding that the applicant was generally lacking in credibility, and that the Board supported that finding by referring to several examples of implausible testimony, exaggerations, embellishments, or vague testimony.

[41] The Court agrees with the respondent that there was nothing inconsistent in the Board stating that the applicant "may have been assigned to a unit known as Cobra Elite", and then later stating: "The panel therefore does not believe he was a member of any special police unit selected to investigate and go after high profile drug traffickers that started with him as a member." The second statement contains several more facts than the first, and the Court finds it reasonable for the Board to accept one small element of the applicant's story (being assigned to a unit called Cobra Elite), while ultimately rejecting the story as a whole. Furthermore, given the clear finding of a general lack of credibility, the Court does not find that the use of the phrase "may have" constitutes an ambiguous credibility finding thereby creating a reviewable error.

[42] The Court does not agree with the applicants that the Board conducted a microscopic analysis of the evidence – it is true that the date of the applicant's graduation and the date the Cobra Elite unit was formed are relatively small details. However, the Board's negative credibility finding was not based solely on his inability to recall those dates; rather, those were two in a long list of examples of the applicant providing insufficient detail to be found credible.

[43] The Court is also not persuaded that the Board erred by failing to give a reason for rejecting the threatening notes adduced by the applicants. The Board's decision states: "The panel believes that the notes are part of the claimant's strategy to engage in exaggerations and embellishments to bolster his claim for refugee status…" Thus, the Board rejected the threatening notes as not credible because it appeared to the Board that they were fabricated by the applicant.

[44] As further evidence of the Board's meaning in this passage, the Board went on to give another "example" of this kind of fabrication, when it discussed the photo the applicant claimed had been surreptitiously taken of his wife. Since his wife appeared to be posing and smiling for the photo, the Board found that he had "concocted the story about his wife's photograph being taken candidly by members of the alleged agents of persecution to mislead the panel that she was being stalked." Thus, the Board made a clear finding that the applicant intended to mislead the Board by presenting the notes and the photo, and the Court finds nothing unreasonable in this conclusion.

[45] Furthermore, the Board's statement that the applicant did not report the threats to his superiors was not made without regard to the evidence – at that point in its decision the Board was referring to the 'informal' reports the applicant claimed to have made before making his formal report a year later. The Board did not find this plausible, and there is nothing unreasonable in its conclusion.

[46] The Court acknowledges that the Board should have made a clear finding on the police response to the applicant's formal report, and the police document confirming that the applicant was a member of the Cobra Elite unit. The Board should have made a clear finding that the documents

were either authentic or fabricated. These “Federal Police” documents directly contradict the Board’s finding, but the Board reasonably gave them no weight because they were thought to be part of the applicant’s fabrication and embellishment.

[47] Finally, the Court agrees with the respondent that the Board does not rely on the authenticity of the impugned police response to making further negative findings against the applicant; rather, it further expands on the implausibility of the applicant’s testimony regarding his attempt to seek protection. The Board states at paragraph 36 of its decision:

> 36 …In addition, why would his superiors tell him that nothing would happen to him when he made his so-called informal reports, but in response to his formal report, there is no such statement made? In fact, now he was being told that they cannot protect him because they lack the resources to do so…

Thus, the Board is expanding on why it does not believe the applicant’s evidence regarding his attempts to seek protection, because the inconsistency in the supposed response of his superiors makes the story as a whole implausible. The Court therefore finds no error in this regard.

[48] It is the role of the Board to assess the credibility of refugee claimants. In this case, the Board thoroughly analyzed the applicant’s credibility, and in its opinion the applicant went to great lengths to embellish, exaggerate and fabricate his testimony. This conclusion was reasonably open to the Board, and the Court therefore has no basis to intervene.

Issue #2: Was the Board’s conclusion regarding the availability of state protection unreasonable?

[49] Given the Court’s conclusion that the Board’s credibility finding was reasonable, so that the judicial review must be dismissed, the Court does not need to deal with this issue.

CONCLUSION

[50] The Court finds that the Board's conclusion regarding credibility was reasonably open to it. Therefore this application for judicial review is dismissed.

[51] No question is certified.

JUDGMENT

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

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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