Federal Court  Cour fédérale

Date: 20130104

Docket: IMM-3227-12

Citation: 2013 FC 7

Ottawa, Ontario, January 4, 2013

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

CARLOS ALFREDO MARTINEZ GIRON

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 [the *Act*], of the March 13, 2012 decision of the Immigration and Refugee Protection Board – Refugee Protection Division [the Board] denying the applicant's claim for protection pursuant to sections 96 and 97 of the *Act*.

[2] The Board found that the determinative issue was the applicant's credibility and concluded that there was insufficient credible evidence to make a positive protection finding under sections 96

or 97. As a result, the Board found that the applicant was not a Convention refugee because he did not have a well-founded fear of persecution on a Convention ground in El Salvador. The Board also found that the applicant was not a person in need of protection as his removal to El Salvador would not subject him personally to a risk to his life or to a risk of cruel and unusual treatment or punishment or to a risk of torture.

[3] Interestingly, the Board did not address the issue of whether the section 96 claim should fail because the applicant's fear was not based on a Convention ground, as it has in other cases where the fear is from organized crime.

[4] For the reasons that follow, this application for judicial review is allowed.

Background

[5] Mr Giron, a citizen of El Salvador, arrived in Canada in July 2008 with a temporary work permit to work in the construction industry. He subsequently claimed refugee protection based on events which occurred while he was in El Salvador and following his departure.

[6] Mr Giron claimed refugee protection due to the risk he and his family faced from organized criminals in El Salvador. Mr Giron recounted that he began working for the Judicial Centre of Metapan, El Salvador, in 2001. He initially worked as a cleaning and gardening attendant and, after studying computer science, worked in the court's Information and Technology [IT] services and had access to confidential court records. Mr Giron was approached by members of the Mara Salvatrucha

gang and offered payment for access to confidential court files. He refused to comply and soon began receiving threats.

[7] In 2007, Mr Giron was seriously injured in a car accident which he believes was orchestrated by the gang as a reprisal. In April 2008, the colleague who replaced Mr Giron at work while he recovered from his injuries was killed in another car accident. Mr Giron believes that this was also orchestrated by the gang.

[8] Mr Giron's wife, who operated a small store, was extorted by the same gang. This extortion was soon understood to be linked to the applicant's refusal to cooperate with the gang. Mrs Giron moved twice to other cities in El Salvador, with their daughters, but the gang tracked her down and threatened her against relocating again.

[9] After Mr Giron came to Canada to work in July 2008, his wife continued to be extorted. In July 2009, the gang left notes indicating that they knew where the applicant was and that he had "an account pending". The applicant's wife reported this to the police and was advised that she would have to testify against the gang if arrests were made. She was fearful of doing so.

[10] In June 2011, a year after the applicant sought refugee protection, the applicant's father was abducted and murdered. The abductors allegedly indicated that this was related to their "account pending" against the applicant. Soon after the murder, the applicant's wife and daughters fled to Guatemala where they remain without status.

Issues and Standard of Review

[11] The applicant submits that the decision is not reasonable and that the Board erred with respect to four issues: the implausibility findings; the credibility findings; the rejection of the applicant's documentary evidence; and, in failing to conduct a forward-looking assessment of the risk of persecution or need for protection upon Mr Giron's return to El Salvador.

[12] The respondent submits that the decision was reasonable: the Board stated its implausibility and credibility findings clearly, and based on the decision as a whole, there were numerous inconsistencies coupled with a lack of credible supporting evidence.

[13] The applicable standard of review for the determinative issues is that of reasonableness. I have considered the relevant jurisprudence which emphasises that the role of the court on judicial review where the standard of reasonableness applies is not to substitute any decision it would have made but, rather, to determine whether the Board's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47. Although there may be more than one reasonable outcome, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome": *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59.

[14] With respect to the Board's analysis of credibility and plausibility, given its role as trier of fact, the Board's findings warrant significant deference: *Lin v Canada (Minister of Citizenship and*

Immigration), 2008 FC 1052, [2008] FCJ No 1329 at para 13; *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857, [2012] FCJ No 924 at para 65.

[15] This does not mean, however, that the Board's decisions are immune from review where intervention is warranted. In *Njeri v Canada (Minister of Citizenship and Immigration)*, 2009 FC 291, [2009] FCJ No 350 Justice Phelan stated:

> [11] On credibility findings, I have noted the reluctance that this Court has, and should have, to overturn such findings except in the clearest case of error (*Revolorio v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1404). The deference owed acknowledges both the contextual circumstances and legislative intent, as well as the unique position that a trier of fact has to assess testimonial evidence. That deference is influenced by the basis upon which credibility is found. The standard is reasonableness subject to a significant measure of deference to the Immigration and Refugee Board.
>
> [12] However, deference is not a blank cheque. There must be reasoned reasons leading to a justifiable finding. With considerable reluctance, I have concluded that this decision does not meet this standard of review.

[16] Given that this decision is based to a significant extent on the Board's implausibility findings, the jurisprudence governing implausibility has been considered and applied along with the principles noted above.

[17] Justice Noël made a clear distinction between credibility and plausibility findings in *Ansar v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1152, [2011] FCJ No 1438:

> 17 Initially, **an important distinction must be made between the RPD's credibility findings and its conclusion that the threat posed by Mr. Choudhry was "implausible".** The panel must be mindful of the use of this term and its implications. **Implausibility**

> **findings must only be made "in the clearest of cases"** (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7, [2001] FCJ 1131). The panel's inferences must be reasonable and its reasons set out in clear and unmistakable terms (*R.K.L. v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 9, [2003] FCJ 162). As Justice Richard Mosley explains in *Santos v. Canada (Minister of Citizenship & Immigration)*, 2004 FC 937 (F.C.) at para 15, [2004] F.C.J. No. 1149 (F.C.):
>
> > [P]lausibility findings involve a distinct reasoning process from findings of credibility and can be influenced by cultural assumptions or misunderstandings. Therefore, implausibility determinations must be based on clear evidence, as well as a clear rationalization process supporting the Board's inferences, and should refer to relevant evidence which could potentially refute such conclusions
> >
> > [underlining in original, bold added]

[18] In *Divsalar v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 653, [2002] FCJ No 875 [*Divsalar*], Justice Blanchard stated:

> [22] The jurisprudence of this Court has clearly established that the CRDD [the Refugee Protection Division's predecessor] has complete jurisdiction to determine the plausibility of testimony, so long as the inferences drawn are not so unreasonable as to warrant intervention, its findings are not open to judicial review. [See *Aguebor v. Minister of Employment and Immigration]* (1993), 160 N.R. 315, pp. 316-217 at para. 4.]
>
> [23] There is also authority that would see a Court intervene and set aside a plausibility finding where the reasons that are stated are not supported by the evidence before the panel. In *Yada et al. v. Canada (Minister of Employment and Immigration)* (1998), 140 F.T.R. 264, Mr. Justice MacKay, at page 270 para. 25 wrote:
>
> > Where the finding of a lack of credibility is based upon implausibilities identified by the panel, the court may intervene on judicial review and set aside the finding where the reasons that are stated are not supported by the evidence before the panel, and the court is in no worse position than the hearing panel to consider

> inferences and conclusions based on criteria external to the evidence such as rationality, or common sense.

[19] In *Cao v Canada (Minister of Citizenship and Immigration)* 2007 FC 819, [2007] FCJ No 1077, Justice O'Reilly cited *Divsalar* and noted, at para 7:

> With respect to a finding of implausibility, the Court is often just as capable as the Board at deciding whether a particular scenario or series of events described by the claimant might reasonably have occurred.

Plausibility

[20] In the present case, the Board made three findings which it clearly identified as implausibility findings.

[21] First, the Board found it implausible that the gang would be able to identify the applicant as "someone with information to sell".

[22] Second, the Board found that "[a]nother apparent implausibility is the claimant's very presence in Canada". It noted that "the criminals seem to have had ample opportunity to kill the claimant, if that is what they actually wanted to do" given the violent nature of the gang, the two allegedly targeted car accidents, and the fact that the applicant was living openly while in El Salvador. In other words, it was implausible that the applicant would have escaped this fate if his account were true.

[23] Third, the Board found it implausible that the applicant's wife had sent to him, in Canada, the original version of the written threats that she had received. The Board questioned why these notes were not provided to the police after the murder of the applicant's father by the same gang in June 2011, and noted that this fact "creates a concern that they are not genuine evidence".

[24] These implausibility findings are unreasonable as they are not based on the evidence that was before the Board. Rather, these findings are based on speculation and on misunderstanding of the evidence.

[25] The Board's suggestion that the applicant should have known how the gang became aware that he worked at the court ignores his testimony that he did not know the gang member who approached him and had no previous interaction with the gang. Mr Giron indicated that it was his position at the court that initially made him a target, and not him personally. The fact that court personnel are targeted by gangs was also described in the country condition documents.

[26] This is not a 'clear case' where the applicant's testimony was implausible. There was relevant evidence to refute this implausibility finding and it is, therefore, not reasonable.

[27] The Board's suggestion that the gang would have killed Mr Giron had they "actually wanted to", and that his mere presence in Canada makes his story implausible, is based on speculation as to how this gang operates. It also unreasonably suggests that the only way Mr Giron's story would have been plausible is if he had actually been killed.

[28] This Court has cautioned against speculative reasoning in several recent cases. In *Beltran v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1475, [2011] FCJ No 1778 [*Beltran*], Justice Rennie stated:

> 8 Here, the Board speculated that a reasonable extortionist would have specified the sum of money demanded together with the means of payment, in the first phone call. The Board also found as implausible that the extortionists would make a call warning the applicant that he would be killed for having reported the threats to the police. This presumes much as to the *modus operandi* of the extortionist. The characterization of the events as described as implausible does not withstand the test of reasonableness.

[29] In *Imafidon v Canada (Minister of Citizenship and Immigration)*, 2011 FC 970, [2011] FCJ No 1192 [*Imafidon*], Justice de Montigny also found speculation on the part of the Board to be unreasonable:

> 11 The Board stated "If the claimant was truly forced into service as a prostitute, the panel finds it reasonable to believe that Mr. Efe would have taken swift action to protect his investment, but he did not." This is speculative. The Board does not have enough knowledge of the circumstances to be able to assume that just because Mr. Efe did not ultimately force the applicant to have an abortion, her entire story is necessarily a fabrication. To make such an assumption is a leap of logic.

[30] In *Zacarias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1155, [2011] FCJ No 1252 [*Zacarias*], Justice Gleason reviewed the jurisprudence on plausibility and related credibility findings, and noted:

> 11 An allegation may thus be found to be implausible when it does not make sense in light of the evidence before the Board or when (to borrow the language of Justice Muldoon in *Vatchev*) it is "outside the realm of what reasonably could be expected". In addition, this Court has held that the Board should provide "a reliable and verifiable evidentiary base against which the plausibility of the

> Applicants' evidence might be judged", otherwise a plausibility determination may be nothing more than "unfounded speculation" (*Gjelaj v Canada (Minister of Citizenship and Immigration)*, 2010 FC 37 at para 4, [2010] FCJ No 31; see also *Cao v Canada (Minister of Citizenship and Immigration)*, 2012 FC 694 at para 20, [2012] FCJ No 885 [*Cao*]).

[31] In *Zacarias*, Justice Gleason allowed the judicial review because the Board's decision was based on "impermissible speculation". The Board had concluded that if the applicant's story were true, he would have been a victim of extortion earlier than he claimed, and that if his life had truly been at risk, the gang members would have succeeded in killing him.

[32] The Board's reasoning in this case is very similar to the reasoning which this Court found to be unreasonable in *Beltran*, *Imafidon*, and *Zacarias*. The Board clearly indicated that the applicant would have had to be killed in order for his story to be plausible. Obviously, if he had been killed, he would not be seeking protection. The Board's suggestion is inappropriate and unreasonable.

[33] With respect to the Board's implausibility finding regarding the original written threats which were received by the applicant's wife and forwarded to him in Canada, the Board appears to have misunderstood the evidence provided by the applicant and the sequence of events as reflected in the record. The record established that the applicant's wife forwarded the original notes to him in October 2009. The applicant testified that there was no police investigation into these threats. The Board questioned why these notes were not provided to the police for their investigation into the murder of the applicant's father. However, this murder occurred in 2011, over a year after the notes were received by the applicant's wife and forwarded to the applicant. They were, therefore, not at hand at the time of the murder. The implausibility finding is based on the Board's misunderstanding

of when the notes were sent, when the applicant's father was murdered, and which of these events the police had investigated.

Credibility

[34] Although the Board's credibility determination was based largely on the implausibility findings, it made additional adverse credibility findings related to two issues: the applicant's inconsistent answers about how he came to have a copy of his colleague's autopsy report, and whether the gang was merely extorting him and his wife or, rather, meting out reprisals for his failure to cooperate with them.

[35] The applicant first indicated that he obtained the autopsy report simply because the death of his friend had a significant impact on him. Later in his testimony he indicated that he had used his computer to obtain the report because his friend's wife needed it for insurance purposes. The Board drew a negative credibility finding from the inconsistent answers given that this event was relevant to the attempt on his own life and to his refugee claim and he should have remembered the details. I find this to be a reasonable finding. However, neither the existence of the autopsy report nor its authenticity were in dispute, and how the applicant came to have it was not central to his claim for protection as it did not reveal who was responsible for the death.

[36] The Board also found that the applicant provided inconsistent answers about whether he was simply being extorted, or whether the extortion constituted reprisal from the gang due to his failure to cooperate. In his initial claim for refugee protection, the applicant indicated he and his family had been victims of extortion by the Mara Salvatrucha gang and had received death threats warning

them to continue to pay the "renta". In his personal information form [PIF], submitted shortly afterward, the applicant elaborated and indicated that, initially, he did not think that the extortion was related to his refusal to cooperate with the gang by providing them with access to court documents. However, he realized that the extortion was connected when his wife received threats referring to his "pending account".

[37] The applicant also explained, and the respondent acknowledged, that he was instructed to be brief in his initial claim for refugee protection, but to provide more details in his PIF, which he did. The applicant submits that these are not inconsistencies, but further details about the reason for the extortion.

[38] While deference is owed to the Board's credibility findings and the Court's role is not to reweigh the evidence, and it appears that the Board placed some weight on what it perceived to be the difference between extortion and reprisals, the Board unreasonably rejected the applicant's explanation. The Board's finding that the applicant was inconsistent ignores the evidence that the applicant was instructed to be brief in the initial claim and that he was instructed to provide a detailed account in his PIF. In addition, it is arguable whether there is any real distinction between describing what occurred more generally as extortion or more specifically as threats of reprisal for failure to provide the gang with access to court documents.

[39] The respondent argues that the inconsistencies between the applicant's PIF and his testimony were significant and went to the heart of his claim.

[40] As noted above, I agree that the finding with respect to the autopsy report was reasonable, but do not agree that the autopsy report is central to the applicant's claim. I do not agree that the Board's finding with respect to the description of the extortion is reasonable.

Documentary evidence

[41] The respondent noted that the Federal Court of Appeal has held that an adverse credibility finding is dispositive of the claim, unless the record contains reliable and independent documentary evidence to rebut it: *Sellan v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381, [2008] FCJ No 1685 at paras 2-3 [*Sellan*].

[42] In *Sellan*, the Court of Appeal answered a certified question as follows:

> 3 …[W]here the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence.

[43] In this case, after finding the applicant's claim to be implausible and the applicant not to be credible, the Board found that there was "insufficient credible evidence in this claim upon which [it could] make a positive protection finding for the claimant".

[44] The Board noted that it gave little weight to the documents provided by the applicant. These documents included the police reports and the threatening notes sent to the applicant's wife. The Board found that these documents, unlike passports, have no security features or "barriers to

concoction" and assigned them little intrinsic reliability. The Board also commented that they were submitted by the applicant, who was found to lack credibility.

[45] Mr Giron submits that a requirement to provide supporting documentary evidence with security features places an impossible burden on applicants. The applicant also submits that the Board erred in failing to independently assess the documentary evidence regardless of its assessment of the applicant's credibility. The applicant cited *Lin v Canada (Minister of Citizenship and Immigration)*, 2006 FC 84, [2006] FCJ No 104 at paras 10-14 and *Wang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 969, [2011] FCJ No 1191 at para 49, in support of the principle that the Board has an obligation to make "some effort" to assess the authenticity of the documents.

[46] The cases cited both dealt with documents adduced to establish the identity of the applicant. In the present case, identity is not at issue. Rather, the Board questioned the authenticity of the police reports, threat notes and other declarations and memoranda submitted by the applicant.

[47] The facts in *Dzey v Canada (Minister of Citizenship and Immigration)*, 2004 FC 167, [2004] FCJ No 181 are more similar to the present case. The Board found the claimant not to be credible and gave little weight to hospital and police reports, as well as divorce papers, which lacked security features. In rejecting the applicant's argument that the Board unreasonably failed to consider her evidence, Justice Mactavish stated:

> 19 The Immigration and Refugee Board has a well-established expertise in the determination of questions of fact, including the evaluation of the credibility of refugee claimants. Indeed, such determinations lie at the very heart of the Board's jurisdiction. As a

> trier of fact, the Board is entitled to make reasonable findings regarding the credibility of a claimant's story, based on implausibilities, common sense, and rationality…
>
> 22 …in the present case, the Board clearly questioned the authenticity of the documents, and gave explicit reasons for its concerns in this regard…
>
> 24 I am of the view that the Board's decision to give the hospital certificate little weight ought not to be disturbed. The Board considered the document, and explained why it chose to accord little weight to the document. I cannot conclude that the Board's treatment of this evidence was patently unreasonable.

[48] In the present case, it cannot be said that the Board ignored the potentially corroborative documentary evidence. The Board examined it, indicated that it gave it little weight and explained why. However, the Board's assessment of the documentary evidence was influenced by its adverse credibility and plausibility findings against the applicant.

Forward-looking assessment

[49] The applicant submitted that the Board erred in applying the test to determine if the applicant was a Convention refugee or person in need of protection. According to the applicant, the Board assessed only past events rather than conducting a forward-looking assessment and considering the risk the applicant would face upon his return to El Salvador. The applicant had provided evidence of threats received after he fled to Canada along with evidence of his father's murder. The applicant submits that the Board failed to consider this in its determination of whether the applicant would face a risk upon his return.

[50] It is trite law that the test for persecution and protection is forward-looking. Had the Board applied the test incorrectly, the decision would be reviewable for correctness. However, the Board's decision was based on the implausibility and credibility findings concerning that applicant's claim as a whole. The Board did not ignore the fact that the applicant's father had been killed, although it may not have believed that this was related to the extortion of the applicant. Since the Board disbelieved the applicant's claim to begin with, it did not 'misapply' the test *per se*. Stated otherwise, the Board's analysis did not extend to assessing the risk of future persecution since it did not believe that the applicant had been persecuted to begin with.

Conclusion

[51] The Board's implausibility findings were based on speculation and a misunderstanding of the evidence that was before the tribunal. As such, its implausibility findings are not reasonable. The events which the Board found to be implausible were essential to the applicant's claim as they described the risk he faced and would face if he returned to El Salvador. The implausibility findings were central to the Board's negative decision and its other findings were influenced by or bound up with the implausibility findings.

[52] Although the Board did not err in its credibility finding with respect to how the applicant came to possess the autopsy report, this one finding is not sufficient to support the otherwise unreasonable findings. Similarly, the Board's assessment of the documentary evidence may, in different circumstances, have been justified. However, its conclusion in this case was based to some extent on the fact that the evidence had been adduced by the applicant, who the Board found not to be credible. This credibility finding was in turn based primarily on the Board's conclusion that the

applicant's account was implausible. Given that those implausibility findings were not reasonable, the Board's conclusions regarding the documentary evidence cannot salvage an unreasonable decision.

[53] For these reasons, the application for judicial review is allowed. No question was proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The decision is quashed and the matter is returned for reconsideration by a differently constituted panel of the Immigration and Refugee Board.

2. There is no question for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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