Federal Court  Cour fédérale

Date: 20140617

Docket: IMM-2887-13

Citation: 2014 FC 573

Ottawa, Ontario, June 17, 2014

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

BRANDON CARL HUNTLEY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

Overview

[1] Mr Huntley is a white citizen of South Africa who first came to Canada on a temporary work permit in 2004. He sought refugee protection in 2008, alleging persecution due to his race and political opinion. The Immigration and Refugee Board (the Board) granted refugee status to Mr Huntley in 2009. Upon judicial review, in *Canada (Minister of Citizenship and Immigration) v Huntley*, 2010 FC 1175, (*Huntley #1*), Justice Russell found the decision of the Board to be

unreasonable, set it aside and ordered that the applicant's claim be re-determined by a newly constituted panel of the Board.

[2] Mr Huntley's original Personal Information Form [PIF], which he signed on May 27, 2008, set out his experience as a white male in South Africa, including at least six alleged assaults on him by Black South Africans.

[3] He submitted an updated PIF on August 29, 2012 which recounts more recent events in South Africa and includes his *sur place* refugee claim, (i.e. based on events which occurred while he was in Canada) on the basis of the media attention garnered by the Board's initial decision to grant him refugee status. The applicant spoke to the media at that time touting his refugee status as validating his allegations that racism against white people in South Africa was rampant. The media coverage was international, and certainly reached South Africa.

[4] The *de novo* hearing was held on October 23 and 24, 2012. The Board determined that he was not a Convention refugee pursuant to section 96, nor a person in need of protection pursuant to section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *Act*) in its decision dated January 10, 2013.

[5] The applicant, Mr Huntley, now seeks judicial review of that decision pursuant to section 72 of the *Act*.

[6] On this judicial review, the applicant argues that Justice Russell, in *Huntley # 1*, found the 2009 decision unreasonable due to the lack of objective evidence of racism and persecution

of white South Africans. The applicant submits that he gathered that evidence and provided it to the Board for the *de novo* hearing. However, the Board ignored or misunderstood this evidence and preferred other evidence, without proper analysis, and without explaining why it discounted or rejected the applicant's evidence.

[7] The applicant raised serious allegations about the risks to white people in South Africa and portrayed this judicial review as critical to the future of other potential refugees. The applicant argues in his written memo that the position of the respondent, the Minister of Citizenship and Immigration, is a veiled attempt to hide a reality that should be given a spotlight. Such a statement disregards the purpose of judicial review, which is to determine whether the Board's decision which found that Mr Huntley was not a Convention refugee or a person in need of protection is reasonable.

[8] I share the view expressed by Justice Russell in *Huntley # 1*, at para 235,

> I wish to emphasize again that all I am dealing with is a particular decision about one white South African within the narrow confines of Canadian jurisprudence on reviewable error. This decision cannot, and should not, be taken as either a personal or a political opinion or assessment about the plight of white South Africans in the post apartheid era. [emphasis in original]

[9] For the reasons that follow I find that the Board's decision is reasonable and the application is dismissed.

Background

[10] Mr Huntley arrived in Canada in July 2004 on a five-month temporary work visa, sponsored by a Canadian employer. He returned to South Africa when the visa expired in November 2004 and reapplied for a temporary work visa. He returned to Canada in June 2005. He reapplied for work visas from within Canada until he was no longer permitted to do so. His last work visa expired on December 31, 2006. He remained in Canada without status and filed a claim for refugee protection in April 2008.

[11] The applicant's claim is based on his fear of persecution and risk to his life if he returns to South Africa.

[12] In his original PIF he recounted the following incidents:

- In 2000, he received delayed medical treatment (stitches and x-rays) in favour of Black patients at a hospital where all staff were Black;

- He applied to the Home Office for a passport and had to return three days in a row to submit his passport application because Black citizens were permitted to go ahead of him in line;

- He was required to submit additional documentation not required of Black applicants when making his application for his work permit for Canada;

- He was unable to obtain a job in South Africa due to "Affirmative Action";

- He was assaulted and stabbed at least six times since he was a teenager by Black South Africans because of his race. During these incidents, he was subjected to racial slurs;

- He is aware of other white South Africans who have been "hijacked" and/or assaulted;

- During the previous election, members of the African National Party [ANC] chanted phrases such as "Kill the Whites"; and,

- Members of his family in Roodeport, SA have hired a security company to follow them if they have to drive anywhere at night.

[13] The applicant did not report the assaults to the authorities believing nothing would be done. He stated that when he returned to South Africa in November 2004 he realized that he could not live there because he was constantly afraid for his personal and financial security.

[14] In his updated PIF, the applicant claims that he went to the media following his positive refugee decision in 2009, because he "felt so strongly that millions of people did not know what was going on in South Africa regarding the plight of white South Africans […]". In response to media reports regarding the Board's decision, the South African government commented that the decision was "racist" and affected the relationship between Canada and South Africa.

[15] The applicant claims that South African news sources reported on his positive refugee determination, making his face well-known publicly and that South African journalists continue to contact his lawyer for updates on his status. The applicant's mother saw an advertisement on a

bus for a newspaper which included a picture of him. In addition, Facebook posts following these news reports included threats against him. As a result of this exposure, the applicant fears reprisals for making a refugee claim against South Africa and publicizing it internationally. He believes he would be flagged at the airport upon arrival.

[16] The applicant also states that African National Congress [ANC] leaders continue to chant and sing songs encouraging and/or condoning the killing of white people. The applicant notes that he fears Black citizens who will follow the messages of the political leaders and that state protection will not be available to him.

The Decision under Review

[17] The Board rendered a 38-page decision finding that the determinative issues were the applicant's credibility and the adequacy of state protection.

[18] The Board found that the applicant's delay in making a claim for refugee protection until April 2008 undermined his credibility with respect to his subjective fear of persecution. His explanation for the delay was unreasonable given that he testified that he learned he could seek refugee protection in June 2007, 10 months before he applied for refugee status.

[19] The Board also noted that the applicant had returned to South Africa for several months in November 2004.

[20] The Board found the applicant's credibility was also undermined by inconsistencies in his testimony at his original hearing and the *de novo* hearing. In the *de novo* hearing, he referred to

racial slurs that were yelled at him during the assaults, but the racial slurs were not mentioned at the first hearing.

[21] The Board acknowledged that there were serious human rights problems in South Africa, but noted that the judiciary is independent, there is access to the courts to bring civil lawsuits for human rights violations and there are also non-governmental organizations [NGOs] as well as the South African Human Rights Commission working to promote human rights in government and in the general population.

[22] The Board considered the extensive documentary evidence submitted by the applicant and the documentary evidence in the National Documentation Package [NDP]. The Board placed significant weight on a series of reports generated by the United Nations Human Rights Council [UNHCR] following its Universal Periodic Review of South Africa. The Board found that the UN reports show that South Africa is committed to promoting human rights. The Board also noted that the UNHCR acknowledged reports of corruption within the police force in South Africa. However, decreasing crime rates were also reported and South African representatives responded that reports of corruption are addressed through administrative and criminal proceedings.

[23] The Board reviewed the expert evidence submitted by the applicant, but found that the concerns set out in the applicant's evidence were not echoed in the reports published by the UNHCR and other NDP documents.

[24] The Board also referred to the reports of the United Kingdom [UK] Home Office and Freedom House, which confirmed that some political leaders continue to sing and chant songs that amount to hate crimes and, although they have been sanctioned for this behaviour and ordered to stop, this conduct has led to racial tension. The Board found that these reports do not confirm that there are preparations underway for genocide, as suggested by Dr Stanton, who provided documentary evidence for the applicant.

[25] The Board noted the submissions of the applicant arguing that the reports from the US Department of State and Amnesty and Human Rights Watch would not reflect the murders of white people, or that these murders were racially motivated, because the Universal Periodic Review [UPR], which was relied on in these reports, does not include data on the ethnicity of the victim.

[26] The Board also referred to the decision of Justice Russell in *Huntley #1* where he found that the Affirmative Action policies of the South African government cannot reasonably be found to rise to the level of persecution. Justice Russel also distinguished the plight of white farmers experiencing violence from the applicant's personal situation as he is not a farmer.

[27] The Board found the NDP documents, including the UNHCR reports, to be credible and trustworthy evidence on the basis of the trustworthiness of the organizations generating the reports and the specific contributions made to these reports. The Board expressly noted that it gave more weight to this evidence than to the documents submitted by the applicant, but added that "the opinions and the information entered into evidence by the claimant raise serious concerns."

[28] The Board considered the relevant principles regarding discrimination versus persecution and noted that prior incidents of discrimination could amount to persecution, but found that in this case, they did not. The Board found that the applicant had not established that the assaults prior to 2004 were connected to his race.

[29] The Board then considered the applicant's *sur place* claim that he could face persecution as a result of his positive refugee determination in 2009 and the media attention it generated, but found that based on all the evidence, this claim amounts to pure speculation. The applicant did not present objective evidence that he would be attacked as a result of his actions in Canada.

[30] The Board noted that it was necessary to go beyond the applicant's personal situation to determine the risk he faces and considered his submissions that he is a member of a group that is persecuted because of race, and that group faces a possible genocide.

[31] The Board found that the evidence as a whole does not corroborate the existence of a generalized oppression of white people or the existence of preparation for a genocide against them in South Africa. Accordingly, the applicant had not established the existence of a reasonable chance or serious possibility of persecution should he return to South Africa merely because he is a member of the racial or ethnic group consisting of white citizens of South Africa.

[32] The Board then turned to the consideration of adequate state protection noting that he never informed the South African authorities of the assaults against him before he left in 2004. The Board noted that the fact that police have acted illegally in some areas of the country does

not establish that the state as a whole is an agent of persecution or that it does not offer protection to victims of crime.

[33] The Board found that it was reasonable to expect the applicant to attempt to seek protection in his country before making a refugee claim and that he had not made any such efforts. In the circumstances, he had not rebutted the presumption of adequate state protection.

[34] The Board acknowledged that while South Africa was a young democracy with ongoing problems, it is a functioning democracy with independent judicial institutions.

[35] In conclusion the Board stated at para 76:

> In short, I find that the claimant did not present to me evidence establishing that in the past, he did what was necessary in the circumstances and in that context to alert the South African authorities and to try to obtain their protection, or that in the future, he would be prevented from informing the South African authorities and obtaining their protection if he were subjected to persecution, to a risk to his life or to torture.

Standard of Review

[36] The standard of reasonableness applies to the review of decisions of fact, mixed fact and law and credibility. The role of the Court on this judicial review is, therefore, 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*, at para. 47)". There may be several reasonable outcomes and "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).

[37] Credibility findings are factual and case specific and rely on the assessment by the decision-maker of several factors including the observation of the witnesses and their responses to questions posed. The Board is entitled to draw inferences based on implausibility, common sense and rationality (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, [1993] FCJ No 732 at para 4 (FCA)). Given its role as trier of fact, the Board's credibility findings are to be given significant deference (*Lin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1052 at para 13, [2008] FCJ No 1329; *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857 at para 65, 415 FTR 82).

[38] The adequacy of reasons is also assessed on a reasonableness standard (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 21-22, [2011] 3 SCR 708, [*Newfoundland Nurses*]).

[39] In short, the Court does not re-weigh the evidence or re-make the decision; it assesses whether the decision made by the Board is reasonable, with reference to the principles established in the jurisprudence and the record before the Court.

The issues

[40] The applicant submits that the decision is not reasonable because the Board erred in several respects; the Board's reasons are inadequate, particularly with respect to its credibility findings; the Board made irrelevant and vague credibility findings based on past events; the

Board ignored, misconstrued and misunderstood the extensive documentary evidence and failed to explain why it preferred its own evidence over that provided by the applicant; the Board did not apply the correct test pursuant to section 96; and, the Board's state protection analysis was flawed.

Did the Board provide adequate reasons?

[41] The applicant submits that the Board failed to provide adequate reasons for its decision which frustrates his ability to pursue arguments on judicial review. Although the Board comments that the applicant's credibility with respect to his subjective fear is undermined by his delay in filing his refugee claim and by inconsistencies in his testimony, the Board does not indicate whether these findings only diminish his credibility or lead to a finding of a general lack of a credibility regarding his subjective fear.

[42] The applicant asserts that it is not clear whether the Board accepted the content of the expert affidavits he submitted to establish the existence of race-based persecution and political-based persecution in South Africa, because the decision appears to both accept and reject this expert evidence.

[43] The applicant also submits that it is unclear whether the Board considered the new fears expressed in his 2012 claim, because the Board does not make an express finding. The applicant argues that this demonstrates that the Board did not consider his fears in light of the current situation in South Africa.

[44] The respondent submits that the reasons of the Board were clear and transparent; it considered all the evidence before it, provided explanations for its findings and referred to the evidence relied upon to support the findings.

The Reasons of the Board are Adequate

[45] The applicant's submissions regarding the reasons of the Board are without merit. The Board provided detailed and clear reasons for its findings.

[46] The Board identified three specific issues with respect to the applicant's credibility, as described below.

[47] It is apparent in the reasons, as discussed below, that the Board accepted and carefully considered the affidavit evidence of the applicant's experts, but gave more weight to the documentary evidence in the National Documentation Package.

[48] It is also clear that the Board considered the applicant's new fears of persecution as set out in his 2012 PIF. The Board outlines this aspect of the claim, analyzes and concisely explains why the *sur place* claim is rejected.

[49] The Board noted the applicant`s testimony about his fear of persecution in the future due to the chants and messages of political leaders that incite persecution of white people, that numerous murders of white people in South Africa were racially motivated and that he would be recognized as his photo and name have been circulated.

[50] The Supreme Court of Canada noted in *Newfoundland Nurses:*

> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[51] In the present case, the Board's reasons reveal why it made its decision and permit the Court to determine its reasonableness. The applicant's detailed arguments on this judicial review belie his suggestion that the inadequacy of reasons disadvantaged him in any way in pursuing judicial review.

Did the Board err in making vague credibility findings based on past events?

[52] The applicant submits that if the Board did make a finding of a general lack of credibility with respect to his subjective fear of persecution, it erred. The applicant submits that such a finding was based on the Board's assessment of facts as alleged in his original PIF. The applicant argues it was unreasonable for the Board to consider incidents alleged between 1991-2003 to assess his credibility with respect to his 2012 claim, particularly with respect to the assessment of his *sur place* claim.

[53] The applicant argues that even where the Board finds a lack of credibility, it must go on to assess a *sur place* claim (*Mohajery v Canada (Minister of Citizenship and Immigartion)*, 2007 FC 185 at paras 31-32, [2007] FCJ No 252).

[54] The applicant notes that more recent events in South Africa since 2008 have fuelled his fears of persecution. He submits that the Board only summarised the extensive documentary evidence of these events but did not analyse it or make a credibility finding with respect to his 2012 fears. He argues that this demonstrates that the Board based its findings on past events that are irrelevant to the *sur place* claim.

[55] He also argues that, in any event, any credibility findings were unreasonable; the Board had found him to be credible in his 2008 claim and that on judicial review Justice Russell accepted the credibility findings of the panel.

[56] He submits that the Board erred in finding that he had not mentioned racial slurs that accompanied the assaults in his first claim. He notes that he was not asked about racial slurs at the original hearing, but that he did refer to the use of racial slurs in his original PIF.

[57] The applicant also submits that it was unreasonable for the Board to draw adverse inferences from his return to South Africa in November 2004, because he had explained that he was required to return in order to reapply for a work permit in Canada.

[58] The respondent submits that significant deference must be given to the Board as it is best positioned to assess credibility. The finding that the applicant was not credible was in relation to the claim that he was assaulted on the basis of his race. This is consistent with the reasons of Justice Russell on judicial review of the original decision where he notes that violence in South Africa is generalized and cannot be equated to the persecution of white South Africans (*Huntley #1*, at para 169).

[59] The respondent submits that the applicant indicated that his claim was based on both the past and the more recent events and that at a *de novo* hearing the Board is entitled to consider the entire record. Credibility findings at the first hearing do not bind the second panel of the Board. The respondent also notes that Justice Russell did not make any finding regarding the applicant's credibility.

[60] The respondent submits that the delay in making his refugee claim in 2008 was a reasonable basis for the Board to find that the credibility of his subjective fear of persecution was undermined.

The Board's credibility findings are reasonable

[61] As noted above, the Board's credibility findings are to be given significant deference. The Board heard and questioned the applicant extensively at the *de novo* hearing. The applicant indicated he was relying on both the past and more recent events.

[62] The Board was entitled to consider the entire record and is not bound by any credibility findings of the first Board.

[63] The Board appears to have missed the applicant's mention of racial slurs in his original PIF, despite its review of the earlier transcript, and the applicant's explanation that he returned to South Africa in 2004 in order to seek a new work permit. Nonetheless, the Board was entitled to rely on the applicant's delay in seeking refugee protection, which he only pursued in 2008, notwithstanding his testimony that he realized in 2004 that he could not return to live in South Africa and that he returned to Canada in 2005.

[64] The Board noted that the failure to claim refugee protection upon arrival can impugn a claimant`s credibility, but that a delay could only be measured from the date at which the claimant begins to fear persecution. The Board peppered the applicant with questions regarding why he delayed in making his refugee claim. His answers ranged from his lack of awareness that he could make a refugee claim until June 2007, and that the further delay was due to his belief that he had to be bilingual to become a permanent resident, then that he had other things to do, and then that it took some time to complete the forms. The Board did not find the applicant`s explanation for his delay in making his claim to be reasonable.

[65] In addition, at the *de novo* hearing, when asked whether he had personally been subjected to persecution on the basis of race, he answered "no". It is reasonable for the Board to question why he later changed his story.

[66] The Board made a clear finding that the delay undermined his credibility regarding his subjective fear of persecution if he were to return to South Africa. The Board further noted that this credibility finding did not undermine all aspects of his claim, and continued to assess it.

Did the Board ignore, misconstrue and misunderstand the extensive documentary evidence provided by the applicant and did the Board fail to explain why it preferred its own evidence over that provided by the applicant?

[67] The applicant submits that the affidavit evidence of two experts and numerous articles and media reports establish the existence of race-based and political-based persecution in South Africa. Yet, the Board failed to explain why it preferred the evidence in the National Documentation package.

[68] The applicant referred to the extensive evidence he provided of Dr Stanton and Adriana Stuijt which supports the view that South Africa is in the later stages of preparation for a genocide. The applicant argues that the Board failed to explain how this evidence was weighed and, if it was rejected, why it was rejected.

[69] The applicant notes that the Board indicated that the standard documentation package comes from organizations considered to carry out their work in a serious manner and whose reports have been found to be trustworthy and, the Universal Periodic Review documents come about because members of South African civil society and state representatives gather at an international forum and present their points of view and engage in dialogue. The applicant submits that this is not sufficient explanation; the Board must explain why the documentary evidence of one party is preferred over that of the other party. In addition, the applicant submits that the UPR should not be relied on because these documents do not confirm that the views of South African civil society were considered. The applicant also notes that the UK Home Office report relied upon by the Board was based on the UPR, which cannot be relied on because the crime statistics do not include the ethnicity of victims; therefore, these reports would not reflect racially motivated crime.

[70] The applicant submits that the Board's reasoning is inconsistent because it notes its concerns regarding the evidence of genocide provided by Dr Stanton and Adriana Stuijt, but still prefers its own evidence. The applicant submits that the Board must make an unequivocal finding about this evidence but fails to do so.

[71] The applicant further submits that the Board must explain why it prefers its own evidence. The Board is required to identify the "competing factors" in the evidence and conduct a comparative analysis (*Guerrero v Canada (Minister of Citizenship and Immigration)*, 2010 FC 384 at paras 31- 32, [2010] FCJ No 448 [*Guerrero*]).

[72] The respondent's position is that there was a great deal of evidence and it is clear that the Board considered it all and weighed it as it deemed appropriate, giving more weight to the NDP, including the UPR, because these reports were more current and more credible. It would be unreasonable to expect the Board to make specific references to over 1000 pages of evidence. The respondent also submits that the Board found that the expert affidavits admitted by the applicant raised concerns when viewed in light of objective evidence to the contrary.

The Board did not ignore any evidence; the Board weighed the evidence and provided sufficient justification for preferring the evidence in the National Documentation Package over the applicant's evidence

[73] The Board's decision thoroughly canvasses all the evidence provided; that of the applicant, which was extensive, and that in the National Documentation Package. The Board noted the contradictory evidence and acknowledged the serious concerns raised in the evidence of the applicant.

[74] The Board clearly did not reject the applicant's evidence. However, it found that the evidence in the NDP, which did not reflect, to the same extent, the problems of racial violence against whites and did not reflect the notion of genocide at all, was more credible. It is the Board's role to consider and weigh the evidence, and it did just that. It is not the role of the Court to re-weigh the evidence.

[75] The Board noted that while many human rights issues were raised as concerns in the UN reports, international bodies did not identify discrimination against the white population as an area of concern.

[76] The Board specifically referred to the evidence submitted by the applicant; the affidavits of Dr Stanton and Adriana Stuijt and the attached articles. However, the Board found that the reports published in the UPR concerning South Africa "definitely do not echo the concerns of either Professor Stanton or Ms. Stuijt regarding the imminence of preparation for a genocide targeting white South Africans, nor do the reports from the various organizations that are included in the National Documentation Package on South Africa".

[77] The Board could not have reached this conclusion if it had not analyzed the evidence submitted by the applicant.

[78] The applicant argues that the Board is inconsistent in noting the concerns raised by his evidence, but discounting it. I do not agree that this is an inconsistency. This is the nature of assessing the evidence and determining whether to attach more weight to some evidence than to the other. The Board acknowledged that the evidence suggesting the preparation for a genocide did raise concerns, but that steps can still be taken to address the alleged human rights violations now. The Board concluded that the evidence in the NDP was to be given more weight.

[79] As noted by Justice Mosley in *Smith v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1283, [2012] FCJ No. 1376 [*Smith*], it is within the discretion of the Board to accept or reject and to weigh the evidence:

> [49] It is apparent from the decision that the Board Member read and considered all the expert opinions presented. It was within his discretion to reject some or all of them. The Court accepts that the Member might have reached a different conclusion based on the voluminous material submitted by the applicant with respect to the experiences of gays and lesbians in the US military. It is not the role of the Court to re-weigh that evidence, however, but to determine whether the Board's treatment of it was unreasonable. The fact that the Member's recapitulation of the material and his explanation for discarding it were brief does not invalidate his choice. As the Supreme Court explained in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708:
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> > [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[80] The applicant also relied on *Coitinho v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1037, [2004] FCJ No 1269 [*Coitinho*] for his position that reasons must be provided for preferring one body of documentary evidence over another. I note that the same submissions were made by the applicant to the Board and the Board specifically referred to the passage of *Coithino* that the applicant relied on. In the present case, the Board did provide reasons for preferring the evidence in the NDP, which can be distinguished from the reasons found to be problematic in *Coithino*.

[81] In *Coithino*, Justice Snider found, at para 7:

> [7] The Board goes on to make a most disturbing finding. In the absence of stating that the Applicants' evidence is not credible, the Board concludes that it "gives more weight to the documentary evidence because it comes for (sic) reputable, knowledgeable sources, none of whom have any interest in the outcome of this particular refugee hearing". This statement is tantamount to stating that documentary evidence should always be preferred to that of a refugee claimant's because the latter is interested in the outcome of the hearing. If permitted, such reasoning would always defeat a claimant's evidence. The Board's decision in this case does not inform the reader why the Applicants' evidence, when supposed to be presumed true (*Adu, supra*), was considered suspect. Further, this reasoning cannot even stand on the facts of this case.
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> [emphasis added]

[82] As noted, the Board is entitled to weigh the evidence and prefer evidence that comes from reputable and knowledgeable sources. The issue in *Coithino* was that the evidence was also preferred on the basis that the sources had no interest in the outcome of the hearing. There is no suggestion that this is the basis of the Board's reasoning in this case.

[83] With respect to the applicant's argument that the Board is required to identify competing factors – or competing and contradictory evidence- conduct a comparative analysis and explain how some factors were more persuasive than others, I do not agree that the case relied on by the applicant is at all analogous or applicable and does not support such a general proposition.

[84] In *Guerrero*, above the issue was whether the Board had reasonably considered the evidence to rebut a presumption that the applicant had committed a serious non-political crime and whether it had failed to provide an analysis for its determination.

[85] In the passages relied upon by the applicant, the Court noted:

> [31] In the present case, the RPD certainly refers to and lists the *Jayasekara* factors and I think the Respondent is correct to say that, implicitly at least, a weighing process is evident and, in the end, the RPD decided that the mitigating factors put forward by the Applicant were not persuasive in rebutting the presumption of a serious, non-political crime. But that is as far as the Decision goes.
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> [32] What we do not know is why the RPD found some factors more persuasive than others. There is no real evaluation of the various factors or explanation of how or why, in the end, the conclusion was reached. The Decision remains a list of factors followed by a bald conclusion, even though it is implicitly clear that the RPD did not find the Applicant's mitigating points persuasive in overcoming the presumption.

[86] The facts and the context for the determination made by the Board in *Guerrero* were completely different. In the present case, there are no mitigating or aggravating factors to consider or balance in determining if any presumption has been rebutted; rather, there is a great deal of evidence to be weighed to assess whether the applicant faces a risk of persecution. It would be unreasonable to demand that the Board refer to each document referred to or relied on by an applicant and assign it a specific weight or to assess the relative credentials of each expert or author of a report.

[87] In the present case, the Board did not simply list factors or list the evidence in support of Mr Huntley's position and the evidence that did not support his position. The Board assessed the evidence, acknowledged the concerns raised and explained why it preferred the evidence included in the NDP, which included reports from the UK Home Office, the UN UPR report, and Freedom House.

[88] The Board's decision reflects the established principles in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] FCJ No 1425 [*Cepeda-Gutierrez*]. As Mr Justice Evans wrote in *Cepeda-Gutierrez* at paragraph 17:

> [T]he more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)*, (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[89] In the present case, the Board was not silent and did not make a blanket statement that it had considered the evidence. The Board referred to the applicant's evidence in detail and noted the differences between it and the evidence in the NDP. It clearly did not overlook any contradictory evidence. It reached its conclusions based on its weighing of the evidence, which it was entitled to do.

Did the Board err in applying the wrong factual test pursuant to section 96 to assess Mr Huntley's potential persecution in South Africa?

[90] The applicant submits that in order to establish a risk of persecution, the Board required, as a condition precedent, "the existence of a generalized oppression of white people, or the existence of preparation for a genocide against them in South Africa". The applicant submits that

the Board erred in applying the test pursuant to section 96. The correct test is whether there is both a genuine subjective fear of persecution and objective evidence to support that fear.

[91] The applicant submits that he provided sufficient evidence to establish both his subjective fear and the objective basis for that fear. He submits that he is not required to establish that he would be persecuted; only that he has a genuine fear and that he is part of group that currently suffers the risks alleged (*Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250, [1990] FCJ No 454 (FCA), *Fi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1125, [2007] 3 FCR 400) [*Fi*].

[92] The applicant submits he is part of a group of white people who are afraid and that is all he needs to establish; nothing more personal or specific is required. He submits that the Board failed to consider his fears of the President and other political leaders who chant and sing songs inciting violence against white people.

[93] The respondent submits that the Board properly considered whether the applicant had a well-founded fear of persecution and reasonably determined that he did not. The Board noted that past events can provide the foundation for present fears, but that the past events alleged by the applicant were not connected to his race. The Board then properly considered the applicant's allegations of new fears of persecution on the basis of being white and having compromised his country's reputation due to speaking out following his first refugee claim decision. The Board considered whether there was objective evidence to support a well-founded fear of persecution. The Board concluded the applicant had not adduced any objective evidence to support his subjective fear that someone would want to harm him if he were to return to South Africa.

The Board applied the correct test pursuant to section 96

[94] The Board applied the correct test in determining whether the applicant has a well-founded fear of persecution. The Board expressly stated the standard that must be met:

> […] the evidence must not necessarily show that he has suffered or will suffer persecution. In fact, what the evidence must show is that the claimant has good grounds for fearing persecution for one of the reasons specified in the Act. Moreover, to find that there is a reasonable fear of persecution or, in other words, a reasonable chance or serious possibility of persecution, there need not be more than a 50% chance (that is, a probability), but there must be more than a minimal possibility, given that there is no intermediate requirement between these two limits [citations omitted].

[95] This is the test to be applied (*Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680, [1989] FCJ No 67 at para 8 (FCA)) and the reasons demonstrate that the Board applied this test.

[96] The Board questioned the applicant extensively about his fears. The transcript reveals that his answers were vague and varied. Although he said he was "branded", he only speculated what would happen upon his arrival at the airport in South Africa. He acknowledged that there was no warrant for his arrest.

[97] The Board noted the applicant's evidence that he was now known in the country given his past media notoriety and that he does not trust the country`s judicial system. The Board also acknowledged the applicant`s evidence about political leaders chanting to incite hatred against whites and that white people are targeted, attacked and killed because of their skin colour. However, in the applicant's own testimony to the Board he indicated that he was not aware of any white man being killed by a black person due to the political leader's songs and chants.

[98] Even after finding that the applicant had submitted no objective evidence to support his alleged fears, the Board went on to consider that the fear of persecution can be established by examining the treatment of people in situations similar to that of the applicant. The Board considered the documentary evidence provided but found that it did not support a finding that the applicant had a well-founded fear of persecution.

[99] The Board acknowledged the proposition that the applicant now argues it ignored – i.e. that the evidence need not necessarily show that the applicant has or will suffer persecution, but must show that the applicant has "good grounds for fearing persecution for one of the reasons specified in the Act".

[100] The Board referred to Justice Martineau's comments in *Fi* and cited parts of that decision. In *Fi*, Justice Martineau explained:

> [14] That being said, it is trite law that persecution under section 96 of IRPA can be established by examining the treatment of similarly situated individuals and that the claimant does not have to show that he has himself been persecuted in the past or would himself be persecuted in the future. In the context of claims derived from situations of generalized oppression, the issue is not whether the claimant is more at risk than anyone else in his country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm for which the state is accountable, and if that risk is grounded in their civil or political status, then he is properly considered to be a Convention refugee (*Salibian v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250 at 259 (F.C.A.); *Ali v. Canada (Minister of Citizenship and Immigration)* (1999), 235 N.R. 316.
>
> […]
>
> [16] Therefore, a refugee claim that arises in a context of widespread violence in a given country must meet the same conditions as any other claim. The content of those conditions is no different for such a claim, nor is the claim subject to extra

> requirements or disqualifications. Unlike section 97 of IRPA, there is no requirement under section 96 of IRPA that the applicant show that his fear of persecution is "personalized" if he can otherwise demonstrate that it is "felt by a group with which he is associated, or even, by all citizens on account of a risk of persecution based on one of the reasons stated in the definition [of a Convention refugee]" (*Salibian*, above, at 258).

[101] The Board noted that it was necessary to go beyond the applicant's personal situation to determine the risk he faces. The Board considered the applicant's submissions that he is a member of a group that is persecuted because of race in South Africa, and that this group faces a possible genocide.

[102] However, the Board found that because the evidence as a whole does not corroborate the existence of a generalized oppression of white people or the existence of preparation for a genocide against them in South Africa, the applicant had not established the existence of a reasonable chance or serious possibility of persecution should he return to South Africa merely because he is a member of the racial or ethnic group consisting of white citizens of South Africa.

[103] Although the Board found that there was no general oppression, it did not find that this was a "condition precedent" as the applicant argues; rather the Board found there was no objective evidence to base his fear. As the applicant had relied on the existence of general oppression to base his fear, he had not established fear of persecution.

[104] With respect to the applicant's *sur place* claim and his submission that credibility in relation to the past events is irrelevant to his *sur place* claim, I agree that in *Mohajery*, Justice Blanchard noted that the *sur place* claim must be assessed, at para 32:

> It should be mentioned that this analysis must be done even of the applicant's narrative on the whole or in the part concerning his activities in his country of origin was not believed, insofar as trustworthy evidence establishes activities in Canada in support of the *sur place* claim.

[105] Contrary to the position of the applicant, the Board does analyze the *sur place* claim.

[106] Although the Board's analysis is concise, when considered together with the record, as instructed by *Newfoundland Nurses*, above, the Board's reasoning is clear.

[107] The Board rejected the *sur place* claim noting:

> […] the claimant's testimony is pure speculation. In other words, during the claimant's testimony and in the documents that he submitted into evidence, he did not present any objective evidence establishing that someone will want to attack him merely because his name was mentioned in the South African newspapers or during television broadcasts in connection with his refugee protection claim in Canada and because of the ensuing reactions.

[108] This finding is reasonable; the applicant did not provide the evidence needed to support the *sur place* claim. For example, the applicant claims in his updated PIF that threats were made against him on Facebook, but he was unable provide evidence of this. Similarly, his mother saw his face on a bus advertising a newspaper, but he did not know the name of the paper.

[109] The Board addressed the key question; whether the applicant through his testimony and considering all the documentary evidence established that he has a prospective well-founded fear of persecution by reason of his race, nationality or political opinion if he were to return to South Africa and reasonably concluded that he did not.

Did the Board err in finding that there was adequate state protection in South Africa and that the applicant had not rebutted that presumption?

[110] The applicant submits that the Board found that adequate state protection exists on the basis of state institutions and legislation that only "theoretically" provide recourse for addressing persecution. The applicant submits that his evidence establishes that the police and the state fail to provide this protection. He notes the number of complaints brought against police officers (5869) compared to documented convictions (59) to establish the failure of these protection mechanisms (citing US Department of State (DOS) *2011 Country Reports on Human Rights Practices: South Africa*). The applicant referred to the extensive evidence he submitted, including the Broken Blue Line report which notes that police are often the perpetrators of persecution and violence.

[111] The applicant argues that the Board's decision merely describes the judicial system, but fails to explain how this demonstrates the adequacy of state protection.

[112] He further submits that his failure to attempt to access state protection more than nine years ago before he first came to Canada is irrelevant to his current claim.

[113] The respondent submits that the Board's finding that the applicant did not rebut the presumption of adequate state protection is reasonable. The onus is on the applicant to establish that state protection is not adequate on a balance of probabilities. The presumption is not rebutted by the sheer volume of documentation submitted: *Smith* at para 51.

[114] The respondent notes that the Board concluded that, despite evidence of police corruption, state protection mechanisms exist in South Africa. Therefore, the applicant is required to seek protection in his home country before seeking refugee protection in another country and the applicant had not made any attempt to do so.

The Board's finding that state protection was adequate and that the applicant had not rebutted the presumption of state protection is reasonable

[115] The Board's assessment of the availability of adequate state protection in South Africa is reasonable.

[116] As noted by Justice Mosley in *Smith*:

> [50] As stated by the Federal Court of Appeal in *Carillo v Canada (Minister of Citizenship and Immigration)* 2008 FCA 94 at paragraph 38, a refugee claimant who asserts that state protection in her country of origin is inadequate or nonexistent bears the evidentiary burden of producing evidence to that effect and the legal burden of persuading the trier of fact that the claim in this respect is founded.
>
> [51] The applicable standard of proof is the balance of probabilities and the presumption that state protection is available to the claimant can be rebutted by clear and convincing evidence. That standard is not met by simply submitting a large volume of opinion evidence. Nor is it met by the claimant's perception that she could not avail herself of state protection: *Judge v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1089 at paras 8-10. Without evidence of her attempts to obtain such protection it is impossible to know how she would have fared. Speculation that the state's protection would be inadequate is not sufficient: *Hinzman, Re*, 2007 FCA 171 at paras 57-58.
>
> [52] If the state can provide adequate protection, even if not perfectly and not always successfully, a claimant is required to seek this protection. It is unreasonable to expect a claimant to put her life in jeopardy in order to demonstrate a failure of state protection, but oppressive acts by some persons in authority in a specific place at a particular time do not lead inevitably to the

> conclusion that the state, as a whole, is an agent of persecution or does not offer protection. Regardless of her subjective fear of persecution, the claimant must overcome the objective presumption that the state could protect her. This burden is even heavier when a democratic country subject to the rule of law, like the US, is concerned: *Hinzman*, above at paragraph 46. Claiming protection in another country must be a last resort, not an alternative of convenience or preference.

[117] The Board considered and applied the relevant principles from the jurisprudence.

[118] The Board then assessed whether the applicant could expect to receive adequate state protection upon his return – given his fear of persecution and his fear of being subjected to a risk to his life should he return. The Board questioned the applicant about what he thought would happen upon his return to South Africa. His answers were vague and speculative.

[119] The Board referred to the submissions of the applicant that the Home Office, UK Border Agency Operational Guidance Note for South Africa (February 2012) demonstrates that state protection in South Africa is neither effective nor adequate.

[120] The Board acknowledged that this evidence indicates that there are problems in South Africa involving some police who act with impunity. However, the Board noted the documentary evidence in the NDP which also referred to similar conduct by the police and provided examples of the follow up action including the Independent Police Complaints Directorate, charges that were laid and successful prosecutions. The Board noted delays in the judicial system but also noted that judges were independent. The Board referred to the UK Home Office report and Freedom House regarding South Africa's judicial system, the various levels of courts and their

jurisdiction and the independence of the judiciary. The Board noted that the Constitutional Court of South Africa had addressed discrimination of white persons.

[121] The Board also referred to the Constitution, and laws which prohibit discrimination.

[122] The Board also noted the applicant's testimony about his fear of persecution in the future due to the chants and messages of political leaders that incite persecution of white people and due to the notoriety he received regarding his first refugee claim.

[123] The Board considered whether the applicant was required to seek protection or whether he need not do so because of his fear of being persecuted by police officers who are agents of the state. The Board stated "the real question to be asked is whether it is reasonable to require the claimant to have, in any way, sought protection from his state in the past or to do so in the future, even if some police officers, in some cases, are agents of persecution".

[124] The Board noted that the applicant indicated that he would be afraid to report to a white police officer because they work with black officers. He indicated that any report made would go nowhere, that judges are not independent and that there is a general attitude about white citizens. However, he acknowledged to the Board, in response to its questions, that he had no proof that if he sought state protection or made a report "it will go nowhere".

[125] The Board also noted that the applicant had not provided any evidence that could establish that police officers act in a coordinated way or that reporting a situation of persecution

because of his membership in the group of white people or because of his political opinion would place him in a situation of risk.

[126] The Board found that in the absence of such evidence it must be assumed that there is a fair and independent judicial process in South Africa "despite its shortcomings".

[127] The Board reviewed several possible avenues of redress open to the applicant noting that he had not pursued any of them.

[128] The Board found that it was reasonable to expect the applicant to attempt to seek protection in his own country before making a refugee claim. As he had not made any efforts, in all the circumstances he had not rebutted the presumption of adequate state protection. The Board's findings are reasonable.

[129] The presumption of state protection reflects and reinforces the underlying rationale for international protection as a surrogate regime, which is available only where there is no alternative for refugee claimants (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 726, 103 DLR (4th) 1 [*Ward*]). South Africa is a functioning democracy, albeit with challenges, like many other democratic countries. Therefore, the applicant must produce clear and convincing evidence to prove that, on a balance of probabilities, state protection was not available to him (*Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, at para 26) or would not be available to him if he returns to South Africa and seeks state protection.

[130] As Justice Rennie noted in *Sow v Canada (Minister of Citizenship and Immigration)*, 2011 FC 646 at para 10, [2011] FCJ No 824, the onus on an applicant to rebut the presumption of state protection varies with the level of democracy:

> [10] This principle, however, does not stand in isolation. It is tempered by the fact that the presumption varies with the nature of the democracy in a country. Indeed, the burden of proof on the claimant is proportional to the level of democracy in the state in question, or the state's position on the "democracy spectrum": *Kadenko v Canada (Minister of Citizenship and Immigration)* [1996] FCJ No 1376 at para 5; *Avila v Canada (Minister of Citizenship and Immigration)*, 2006 FC 359 at para 30; *Capitaine v Canada (Citizenship and Immigration)* 2008 FC 98 at paras 20-22.

[131] The applicants' efforts to rebut the presumption have, therefore, been viewed in the context of, and proportional to, the level of democracy and the adequacy of state protection. However, the applicant must take some steps – even when asserting a *sur place* claim – and cannot rely on his own belief that the police will do nothing.

[132] The Chief Justice recently reviewed the jurisprudence regarding state protection in *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 and noted at para 33, [2013] FCJ No 1099:

> [33] In this regard, doubting the effectiveness of state protection without reasonably testing it, or simply asserting a subjective reluctance to engage the state, does not rebut the presumption of state protection (*Ramirez*, above; *Kim*, above). In the absence of a compelling or persuasive explanation, a failure to take reasonable steps to exhaust all courses of action reasonably available in the home state, prior to seeking refugee protection abroad, typically will provide a reasonable basis for a conclusion by the RPD that an applicant for protection did not displace the presumption of state protection with clear and convincing evidence (*Camacho*, above).

[133] The applicant argued, in effect, that there was no onus on him because there would be no adequate state protection for him in South Africa; the police are primarily responsible for state protection and they are complicit in the persecution he fears, and the courts and other oversight mechanisms are ineffective. In other words, it would be pointless for him to approach the police.

[134] He made no attempt to access state protection in 2004 before he left South Africa, despite the fact that he claims he was a victim of six assaults that were racially motivated. He argues that this is not relevant with respect to his current claim, based on his current fears and *sur place* claim resulting from more recent events and conditions in South Africa. The applicant has been in Canada continuously since 2005 and argues that the issue of attempting to access state protection must be considered in this context.

[135] The applicant did not provide sufficient evidence to satisfy the Board that state protection is inadequate, nor did he provide any evidence to rebut the presumption that it would not be available to him if he were to return. He did not provide evidence of similarly situated individuals who have been victims of racially or politically motivated crimes or persecution, or any type of crime or violence, and have not been able to access state protection.

[136] The applicant expressed only his subjective belief that state protection would not be provided to him and his subjective reluctance to avail himself of such protection. He has not established to the satisfaction of the Board any basis for that belief or reluctance. The Board's conclusion that the applicant has not rebutted the presumption of adequate state protection is reasonable.

[137] As noted, refugee protection is considered to be surrogate or substitute protection in the event of a failure of national protection. Persecuted individuals are required to first approach their home state for protection and to exhaust all efforts that are reasonable in the circumstances before seeking refugee protection in other countries.

Proposed Certified Question

[138] The applicant has proposed the following question for certification:

> Is there a greater duty on a panel to explain the rejection of expert evidence than to state that the National Documentation Package or any other non expert evidence that the panel relies on, does not contain the same information as that provided by the expert evidence?

[139] The test for certifying a question was set out by the Federal Court of Appeal in Canada (*Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ No 1637, 51 ACWS (3d) 910 (FCA)) at paragraph 4. The question must be one which transcends the interest of the immediate parties to the litigation and contemplates issues of broad significance of general application and must be determinative of the appeal.

[140] Or, as more simply put in subsequent cases, in order to be a certified question the question must be a serious question of general importance which would be dispositive of the appeal.

[141] The applicant argues that the Board's rejection of the evidence he relied on to support his fear of persecution went to the heart of his claim. Therefore, if the question is answered in his favour, it would be dispositive of his appeal because it would mean that the Board erred in

rejecting his evidence. If his expert evidence were then accepted, which indicates that South Africa is in the later stages of preparing for a genocide, his objective fear would be well founded.

[142] He argues that this question transcends his own interests because thousands of South Africans face the same risks he faces and that his expert evidence describes. He reiterates his argument that the NDP did not reflect the same information as his expert evidence regarding persecution of white people and the preparation for a genocide because the UPR does not include crime data indicating the ethnicity of the victim. Therefore, the Board's explanation for rejecting his evidence is not reasonable.

[143] The respondent submits that the proposed question does not satisfy the test for certification. The question relates to the Board's assessment of and weighing of the evidence which is an issue to be addressed on a case by case basis and is a matter within the jurisdiction of the Board.

[144] The respondent further submits that it would be unreasonable to impose a greater duty on the Board to give reasons when it considers opinions offered by individuals referred to as experts relating to country conditions over other evidence on the record. The respondent notes that this issue was addressed in *Smith*.

[145] I do not find that the question posed by the applicant warrants certification. As I have found, the Board did not reject the evidence provided by the applicant. The Board considered it in detail but gave it less weight. I have also found that the Board provided its explanation for doing so. The Board acknowledged the applicant's submissions that the UPR did not include

data on the ethnicity of the victims and the Board did not find this submission to be sufficient to give less weight to the UPR or to the several reports which relied on the UPR.

[146] The applicant argued at the hearing on this application for judicial review that the Board is obliged to do a comparative assessment of all the evidence submitted and explain or indicate the weight it attaches to all this evidence. In a case such as this, where the applicant has provided over 1000 pages of evidence of his own experts to support his position, it is not realistic to expect the Board to refer to each document and indicate why it gave more or less weight to each piece, or to determine and weigh the particular expertise of each author of each report.

[147] The question as proposed suggests that the applicant provided expert evidence and the NDP included non-expert evidence. While this characterization may not be intended by the applicant, this is not so. In any event, the Board indicated why it gave significant weight to the documentation in the NDP including that it was from reputable and trustworthy organizations, for example, the United Nations.

[148] The Board's role is to weigh the evidence. The proposed question seeks to change the established principles recognized in the jurisprudence that this is the appropriate role of the Board, as noted in *Smith* referred to above. Also as noted above, the Board observed the principles from *Cepeda-Gutierrez* and it analyzed all the important evidence and met its burden of explanation.

JUDGMENT

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

There is no question for certification.

"Catherine M. Kane

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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