

Date: 20050824

Docket: IMM-7643-04

Citation: 2005 FC 1164

BETWEEN:

**HECTOR ALEXANDER CAMARGO MORA; and
JOHANNA AURORA KOOPMANS MARTINEZ**

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

O'KEEFE J.

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“IRPA”), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the “Board”), dated August 20, 2004, wherein it was determined that the applicants were neither Convention refugees nor persons in need of protection.

[2] The applicants seek an order quashing the Board's decision and remitting the matter back for reconsideration before a differently constituted Board.

Background

[3] The applicants, Hector Alexander Camargo Mora (the "principal applicant") and his wife, Johanna Aurora Koopmans Martinez ("his wife") (collectively "the applicants") are citizens of Venezuela. Both the principal applicant and his wife graduated as mechanical engineers and went to work for the Venezuelan Petroleum Company (PDVSA); he in 1995 as a maintenance planner, and she in 1996 as a maintenance programmer.

[4] Beginning in December 2002, the applicants participated in a civil national strike called by the Venezuela Worker's Federation (CTV) because they belonged to the Petroleum Worker's Union (UNAPETROL) which is part of the CTV. As a result of their participation in the strike, they were fired from their jobs and their names appeared in a list of fired PDVSA employees in two newspapers in Venezuela.

[5] From March 2003, the applicants sought other employment but were unable to find new jobs. They alleged they faced discrimination and harassment from the government as it had sent letters to public and private companies in Venezuela prohibiting them from hiring persons who were fired from their jobs at PDVSA for participating in the strike in December 2002.

[6] The applicants alleged that in July 2003, they were required to attend at the offices of the Venezuelan Directorate for Intelligence and Prevention Services (DISIP), and Bolivarian Circles representatives were present. They were offered their jobs back if they agreed to join the Bolivarian Circles. The applicants alleged that when they refused to join, they were both assaulted. They were threatened and told not to report the incident to the authorities or they would pay with their lives as the Bolivarian Circles had infiltrated all security agencies of the state. They alleged that from the next day until August 5, 2003, they received threatening phone calls to the home and cell phones attempting to extort money from them.

[7] On September 17, 2003, the applicants left for Maracaibo City and then to Buffalo, New York via Miami and Atlanta. The applicants claimed for refugee protection in Canada on October 1, 2003.

[8] Their claim was heard via video-conference on June 29, 2004 and denied on August 20, 2004.

[9] This is the judicial review of that decision.

Reasons of the Board

[10] The Board noted that it had serious concerns with the applicants' credibility and subjective fear of persecution because they failed to make a refugee claim while in the United States. The Board, however, made its determination based on the issue of whether the applicants' fear of persecution in Venezuela was objectively well-founded.

[11] The Board looked at the documentary evidence on the situation of former employees of PDVSA whose employment was terminated because of their participation in the anti-government labour strike in December 2002. The Board noted that, *inter alia*, the government had denied the former workers access to company housing, schools and medical benefits. Claiming that their termination was illegal, fired employees filed suit for either reinstatement or compensation. Further, the government filed criminal charges against seven former oil executives for alleged incitement to riot and sabotage of the oil industry.

[12] The Board further noted that there had been demonstrations by some former PDVSA employees, and clashes between former PDVSA employees and pro-government demonstrators. There were also incidents of attempted forced eviction of the striking workers from company housing despite assurances to the contrary.

[13] The Board also stated the following:

On May 15, 2004, a representative of PROVEA provided the following information in correspondence sent to the Board's Directorate. Some fired PDVSA workers, particularly those that made public statements or held senior public service positions, face [translation] "real difficulties" in finding employment in the public sector because of the [translation] "unofficial veto" in finding employment in the public service. The representative did note, however, that the situation is less difficult for other fired workers, but, according to him, the situation in Venezuela is such that anyone who signs a statement against a member of the political opposition will find it difficult to secure employment in the private sector, and anyone who signs a statement against the Venezuelan president will find it difficult to secure employment in the public service. Much depends on whether a person has signed the petition to impeach President Chavez. The PROVEA representative indicated that some private companies involved in the oil industry have been instructed not to hire fired PDVSA workers. However, he had heard of cases of employees being hired in the private sector, in the electrical power sector in Caracas, for example. The PROVEA representative concluded by stating that a handful of fired PDVSA workers were victims of acts of [translation] "repression or violent evictions from

homes belonging to PDVSA”, and he noted that strikers were not targeted by ill-treatment except in [translation] “very isolated” cases.

...

... I considered the claimants’ profiles with PDVSA prior to being fired by their employer and particularly their strike and union activities during and after the December 2002 strike. For the following reasons, I find that the claimants’ employee, union and political profiles are dissimilar from those former PDVSA employees that would be at risk of being denied the right to earn a livelihood in Venezuela or being subjected to serious harm at the hands of the Bolivarian Circles or Venezuelan state authorities. At the hearing, the male claimant provided the following testimony respecting he and the female claimant’s strike and union activities during and following the December 2002 strike at PDVSA. They followed the strike guidelines issued to all members of UNAPETROL that worked at PDVSA and were in regular contact with other union members and UNAPETROL leaders. They only participated in demonstrations and activities called by UNAPETROL during and after the strike to support the union and its demands to push forward the objectives of the strike. They did, however, sign the consultative referendum respecting the government of President Chavez during the December 2002 strike. Although he and the female claimant were sympathizers of the opposition First Justice Party, they were not a member of this or any other political party in Venezuela. There is no evidence before me that the claimants were employed in any senior management positions with PDVSA at the time they were fired. The claimants did not lead any evidence that indicates that they held any official office or position with UNAPETROL while working with PDVSA or that they were forcibly evicted from PDVSA company housing.

...

... The documentary evidence before me does indicate that in September 2003 there were news reports of individuals fired from private sector jobs, of students denied internships, and of military officers disciplined or discharged because they signed the February petitions for a referendum on the Chavez presidency. Again, however, this same documentary evidence indicates that on August 20, 2003, the opposition submitted approximately 3.2 million signatures gathered in February 2003 for a referendum on the Chavez presidency. If in fact it was a common occurrence for all of those Venezuelan citizens that signed the February 2003 referendum on the Chavez presidency to have suffered extreme hardship in obtaining employment in Venezuela, I find it implausible that there would not be reports of such incidents in the documentary evidence before me.

...

Apart from references to oil camps, there is an absence of reports of members of the Bolivarian Circles or other pro-government groups or state authorities, such as the DISP, specifically targeting former employees of PDVSA because of their participation in the December 2002 ant-government strike, termination from PDVSA, or after their names and identification numbers were published nationally in Venezuela. The documentary evidence before me indicates that individuals and

the Venezuelan media freely and publicly criticized the government during 2003. Given the foregoing documentary evidence and other substantive documentary evidence before me on the political situation and country conditions in Venezuela, I find it implausible that there would not be reports of former PDVSA workers being targeted for harassment, extortion attempts or more serious harm at the hands of the Bolivarian Circles, DISIP, or other government authorities if in fact these incidents were occurring as is alleged by the claimants. Based upon the claimants' strike and union activities, political profiles and the documentary evidence before me, I find on a balance of probabilities former PDVSA employees are not being specifically targeted by Bolivarian Circles, DISIP or government authorities today, or by anyone else in Venezuela.

Issues (as framed by the applicant)

[14] The issues as framed by the applicants:

1. Whether the Board erred in law by finding that there was no more than a mere possibility of persecution if the applicants were to return to Venezuela?
2. Whether the Board erred by essentially requiring the applicants to have acted on their political beliefs in order to merit protection?
3. Whether the Board made perverse and capricious findings without evidence and in disregard of the evidence?
4. Whether the Board erred in impeaching the male applicant's credibility due to his failure to claim in the U.S.A.?

[15] At the hearing, the applicants stated the issues as follows:

1. Did the Board make an error in its determination of the applicants' political and employment profiles?
2. Did the Board make an error with respect to the applicants' failure to claim in the United States?

3. Did the Board's determination re: the applicants' profile have the adverse effect of raising the burden of proof?

Applicant's Submissions

[16] The applicants submitted that the Board found that the applicants' fear of persecution in Venezuela was linked to one of the grounds enumerated in the Convention refugee definition, political opinion.

[17] The applicants submitted that the Board erred in rejecting their claims based, *inter alia*, on a finding that their factual situation was dissimilar to other PDVSA workers that would be at risk of (i) being denied the right to earn a livelihood in Venezuela or (ii) being subjected to serious harm at the hands of members of Bolivarian Circles or Venezuelan state authorities. This resulted in elevating the test for a well-founded fear of persecution and held the applicants to an unrealistic standard of proof beyond what is required by the case-law. Under the Board's reasoning, in order for the applicants to succeed in a claim for refugee protection, they must meet most if not all the factual elements in the documentary evidence. That burden of proof is not sustainable under the legal test imposed in *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (C.A.), that anything more than a mere possibility of persecution is a well-founded fear.

[18] The applicants submitted that in the alternative, the Board engaged in a microscopic analysis by engaging in a comparison of negligible factual differences between the applicants and other former PDVSA workers in Venezuela.

[19] The applicants submitted that in the further alternative, the Board erred in its findings as the documentary evidence showed that blue collar workers of the PDVSA were also targeted by the DISIP. The Board ignored the evidence that showed that a youth worker at PDVSA was persecuted by members of the Venezuelan military.

[20] The applicants submitted that the applicants were not required to have a leadership position in a group of which they were members (UNAPETROL) to sustain a claim for refugee status (see *Butucariu v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No.115 (F.C.A.)). The Supreme Court of Canada stated in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, that membership in an organization was not required. Further, the risk can be based on political opinion alone and there is no need for the applicants to have acted on their beliefs in order to merit protection (*Ward, supra*).

[21] The applicants submitted that they provided both documentary and *viva voce* evidence that they were being persecuted by the government through their denial of employment. They further provided evidence related to their political beliefs. While they were in Venezuela, they signed for the consultative referendum but there had not yet been any collection of signatures to impeach President Chavez. Further, the male

applicant testified that they had publicly criticized the Chavez government and their opposition was noticeable.

[22] The applicants further submitted that they were sympathizers of the political party, First Justice. When they were fired from PDVSA, they had their names published in newspapers and were essentially perceived as fascists and “golpists”, and they participated in union events organized by UNAPETROL for the purpose of advancing the union’s objectives.

[23] The applicants submitted that the Board erred in finding that as neither of the applicants were in senior management positions, they would not be subjected to a serious possibility of persecution. The evidence in fact referred to senior “public service” positions, not senior “management” positions. The applicants submitted that in the alternative, the male applicant had been employed at PDVSA for eight years, which might qualify as a senior public service position.

[24] The applicants submitted that the Board erred in making an adverse credibility finding from the applicants’ failure to claim refugee status while in the United States. The Board failed to provide adequate reasons for rejecting the applicants’ explanation for failing to make a claim in the U.S.

Respondent’s Submissions

[25] Standard of Review

The respondent submitted that the standard of review for credibility findings of the Board is patent unreasonableness (see *De (Da) Li Chen v. Canada (Minister of Citizenship and Immigration)* (1999), 49 Imm. L.R. (2d) 161 (F.C.A.)).

[26] The respondent submitted that the applicants are required to show that they subjectively fear persecution and the fear must be well-founded in an objective sense (see *Tabet-Zatla v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1778).

[27] The respondent submitted that based on the evidence before it, it was reasonably open to the Board to find credibility concerns with respect to the applicants' evidence including their political profile, union activities, and the failure to make a claim for protection in the United States. It was also open to the Board to find that the applicants had failed to establish their identity as senior employees or senior members of a public service, and as not having political profiles such as those for whom the documentary evidence indicated were prevented from finding employment on an on-going basis.

[28] The respondent submitted that the Board indicated that the determinative issue was not the applicants' failure to make a claim in the U.S.A., but whether the fear was objectively well-founded (see *Singh v. Canada (Minister of Citizenship and Immigration)* 2003 FC 1146). Even if the Board drew an unreasonable inference in this regard, it does not vitiate the decision and does not detract from the underlying finding that the applicants had failed to demonstrate an objective fear (see *Wu v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 934).

[29] The Board’s finding that the applicants’ evidence was not credible was made in clear terms and supported by specific reference to the evidence. As such, the Board met the legal requirement in arriving at its conclusions.

[30] The respondent submitted that the Board was entitled to rely on documentary evidence in preference to that of the applicants (see *Tekin v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 357). The applicants’ submissions amount to a disagreement with the manner in which the Board weighed the evidence.

[31] The respondent further submitted that the applicants’ submissions that the length of time they worked for the PDVSA “may qualify” as senior positions is mere speculation. They provided no evidence in support of having senior positions with the company or union, or in political involvement.

[32] The respondent submitted that contrary to the applicants’ submissions, there is no evidence that the Board had overlooked any evidence before it. The fact that some of the documentary evidence is not mentioned in the Board’s reasons is not fatal to its decision (see *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317).

Relevant Statutory Provisions

[33] Section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, *supra*, define “Convention refugee” and “person in need of protection” as follows:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison

reasons of race, religion, nationality, membership in a particular social group or political opinion,

d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Analysis and Decision

[34] Standard of Review

The standard of review on questions of credibility is patent unreasonableness (see *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.) and *De (Da) Li Chen v. Canada (Minister of Citizenship and Immigration)* (1999), 49 Imm. L.R. (2d) 161 (F.C.A.)).

[35] Issue 1

Did the Board make an error in its determination of the applicants' political and employment profiles?

The Board, in coming to its decision, considered the applicants' political and employment profile and then compared these profiles to the profiles of people who were targeted by the officials.

[36] Political Profile

The Board noted that the applicants did not hold office in the union. The applicants submitted that there was no requirement to hold a leadership role in an union in order to support a finding of persecution based on political opinion. As well, the applicants stated that there were persons similarly situated to the applicants who were persecuted and that this would support their claim for persecution. The applicants also stated that it is the political opinion perceived of the applicants that counts.

[37] Employment Profile

The Board found that the applicants' employment profile did not fit the profile of persons who were being persecuted because of the strike. The Board stated that persons in senior management positions could face persecution. The applicants pointed out that the documentary evidence refers to persons in "senior public service positions". I do not see any appreciable difference between the two terms. The Board made no error using the term it did to describe the type of workers subject to persecution. In my view, the fact that the applicants were employed in their positions for eight years does not put them in either a senior public service position or a senior management position.

[38] It is my opinion that what the Board did was to look at the documentary evidence and then look at the evidence of the applicants before deciding that based on the applicants' own evidence, the applicants did not fit the political or employment profiles of workers who were being persecuted. The Board did not make an error in this respect. I agree with the respondent that the Board did not need to ask the applicants whether they had senior management positions at their place of employment. The onus was on the applicants to prove their case.

[39] Issue 2

Did the Board make an error with respect to the applicants' failure to claim in the United States?

The Board noted that it had serious concerns about the applicants' failure to claim in the United States. However, it went on to state that one of the determinative issues in the case was whether the applicants' fear of persecution in Venezuela was objectively well-founded. In my view, even if the Board made an error in making the statement concerning the failure to claim in the United States, it does not assist the applicants as it was not a determinative factor in the Board's decision.

[40] Issue 3

Did the Board's determination re: the applicants' profile have the adverse effect of raising the burden of proof?

The applicants submitted that the Board, by stating that the applicants must fit the profile of workers who the documentary evidence stated were persecuted, placed a higher standard of proof of Convention refugee status for the applicants. I do not agree. The Board, at page 9 of the reasons stated:

Based upon the foregoing analysis, I find that there is insufficient credible evidence before me to establish that the claimants would be subjected to persecution for a Convention ground in Venezuela. There is no serious possibility that the claimants' removal to Venezuela would subject them to persecution. Given this finding and the documentary evidence before me, I also find that there is no serious possibility that the claimants removal to Venezuela would subject them personally to a risk to their lives or to a risk of cruel and unusual treatment or punishment, and that there are no substantial grounds to believe that the claimants removal to Venezuela will subject them personally to a danger of torture.

[41] From a reading of the above portion of the decision and the decision on a whole, I cannot conclude that the Board placed a higher burden of proof on the applicants in finding that they were not Convention refugees. The cases cited by the applicants were cases in which conflicting standards of proof were stated and the Court could not determine whether the correct standard of proof was applied.

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

[43] The respondent did not wish to submit a proposed serious question of general importance for my consideration for certification. The applicants shall have seven days from the date of my decision in which to file any proposed serious question of general importance, if any, for my consideration for certification. The respondent shall have a further five days to file any submissions with respect to any such proposed question.

“John A. O’Keefe”
J.F.C.

Halifax, Nova Scotia
August 24, 2005

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-7643-04

STYLE OF CAUSE: HECTOR ALEXANDER CAMARGO MORA and
JOHANNA AURORA KOOPMANS MARTINEZ

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

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REASONS FOR ORDER: O'KEEFE J.

DATED: August 24, 2005

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