Date: 20060421

Docket: IMM-3370-05

Citation: 2006 FC 506

Ottawa, Ontario, April 21, 2006

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

INGRID YULIMA MURCIA ROMERO
(a.k.a. Ingrid Yulima Murcia)
IVONNE ANDREA MURCIA ROMERO
(a.k.a. Ivonne Andrea Murcia)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Ms. Ingrid Yulima Murcia Romero and her daughter, Ivonne Andrea Murcia Romero (collectively, the Applicants) are Columbian citizens who base their refugee claim on a fear of revolutionary guerrillas and paramilitary forces who seek to harm the Applicants as a result of the political opinion of Ms. Ingrid Romero's father. Ms. Romero was married to an American citizen and, on that basis, both she and her daughter held United States Permanent Resident cards that

expired in March and December 2002, respectively. Ms. Romero, while not divorced from her husband, has not lived with him for some time. The Applicants came to Canada from the United States in June 2002 and made their claim for refugee protection.

[2] In a decision dated April 22, 2005, a panel of the Refugee Protection Division of the Immigration and Refugee Board (Board) determined that the Applicants were not Convention refugees or persons in need of protection. The claims were rejected on two bases:

- The Applicants failed to persuade the Board that they had lost their status in the United States and, therefore, pursuant to s. 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*), were excluded as Convention refugees or persons in need of protection as persons who fell within section E of Article 1 of the *United Nations Convention Relating to the Status of Refugees* (Refugee Convention).

- Because of a number of credibility concerns and the lack of an objectively well-founded fear of persecution, the Board was not convinced that there was a serious possibility that Ms. Romero would be persecuted at the hands of the Revolutionary Armed Forces of Columbia (Fuerzas Armadas Revolucionarias de Colombia or FARC) or paramilitaries if returned to Colombia, or that she faced a risk to her life or of cruel and unusual treatment or punishment or be tortured, should she return to Colombia.

Issues

[3] The Applicants, in their initial submissions, raised two issues:

1. Did the Board err by finding that the Applicants were excluded by Article 1(E) of the Refugee Convention?

2. Did the Board err by finding that Ms. Romero was not credible or had not established a well-founded fear of persecution?

Analysis

[4] In this case, either of the two issues considered by the Board is determinative of the Applicants' claim. Thus, even if the Board erred on one of its two key determinations, the decision will stand if the Board did not err with respect to the other.

***Issue #1*: *Did the Board err by finding that the Applicants were excluded by Article 1(E) of the Refugee Convention*?**

[5] As noted, the Board determined that the Applicants were excluded pursuant to Article 1(E) of the Refugee Convention and s. 98 of the *IRPA*. Those provisions state as follows:

United Nations Convention Relating to the Status of Refugees	***Convention des Nations unies relatives au statut des réfugiés***
Article 1(E). This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.	**Article 1(E).** Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.
Immigration Refugee Protection Act	***Loi sur l'Immigration et la protection des réfugiés***
98. A person referred to in Section E or F	**98.** La personne visée aux sections E ou F de l'article premier de la Convention sur

of Article 1 of the Refugee Convention is not a Convention Refugee or a person in need of protection.

les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[6] The first task before me is to establish a standard of review for the Board's decision on the exclusion issue. The Applicants held permanent resident status, as evidenced by their Permanent Resident Cards. These cards were described as "conditional" in that they expired two years after issuance but could be extended pursuant to the provisions of s. 216 of the U.S. *Immigration and Naturalization Act*. Thus, the Board's decision, in part, required that the Board analyze and interpret relevant provisions of this statute. In my view, this particular aspect of the Board's decision is a question of law that is reviewable on a correctness standard. However, provided that the Board's interpretation of this statute is correct, its findings of whether the Applicants meet the requirements of s. 98 of the *IRPA* have been held to a standard of review of patent unreasonableness (*Hassanzadeh v. Canada* (*Minister of Citizenship and Immigration*), [2003] F.C.J. No. 1886 at para. 18 (F.C.); *Choezom v. Canada* (*Minister of Citizenship and Immigration*), 2004 FC 1329 at para. 8).

[7] In this case, the Board's decision revolves around the right of the Applicants to re-acquire Permanent Resident cards, given that their existing cards had expired.

[8] The recent case law on this issue has established the relevant burden of proof for each party in determining whether Article 1(E) applies (*Hassanzadeh*, above; *Canada* (*Minister of Citizenship and Immigration*) *v. Choovak*, [2002] F.C.J. No. 767 (T.D.); *Shahpari v. Canada* (*Minister of Citizenship and Immigration*), [1998] F.C.J. No. 429 (T.D.)). Initially, the burden is on the Minister to establish a *prima facie* case that a claimant can return to a country where he or she enjoys the

rights of the nationals of that country. At that point, the onus shifts to the claimant to demonstrate why, having allowed the permanent residency to expire, she could not have re-applied and obtained a new permanent resident card.

[9] The Respondent argues a *prima facie* case for exclusion was established, by the evidence showing the timeline of Ms. Romero's marriage, her visits to the United States, and her acquisition of residency status. I am not persuaded that the Respondent's position is correct or reasonable.

[10] First, let me turn to what was before the Board with respect to the relevant U.S. law. Section 216 of the U.S. *Immigration and Naturalization Act* deals, generally, with "Conditional Permanent Resident Status for Certain Alien Spouses and Sons and Daughters". Section 216(a)(1) provides that, when an "alien spouse" and their children first acquire permanent resident status, this status is on a "conditional basis". That is what had happened to the Applicants; they were each issued a conditional permanent resident card. Pursuant to s. 216(c)(1), in order for the conditional basis to be removed,

> [t]he alien spouse and the petitioning spouse (if not deceased) jointly must submit to the Attorney General [within 90 days before the second anniversary of the issuance of the conditional permanent resident card], a petition which requests the removal of such conditional basis . . . [emphasis added.]

[11] During the hearing, Ms. Romero testified that she could not locate her estranged husband and that he no longer supported her residency, and therefore she could not renew her residency card. Further, she testified that she had received advice from a U.S. attorney that she would lose her

status. A presumption of truthfulness applies to testimony given under oath (*Maldonado v. Canada* (*Minister of Employment and Immigration*), [1980] 2 F.C. 302 (C.A.)).

[12] It appears, from reading s. 216, that it is possible to file a late petition. However, at that stage, Ms. Romero would have had to establish "good cause and extenuating circumstances for failure to file the petition during the period described" (s. 216(2)(B)). Beyond the bare words of this provision, there is no evidence as to the practice or policy of the Attorney General in how this provision is to be applied.

[13] In my mind, the position of Ms. Romero's husband is critical to the extension or re-acquisition of her permanent resident status. Indeed, it appears to me that Ms. Romero would be on very weak grounds without the co-operation of her husband. In its reasons, the Board does not even refer to the requirement of spousal support for a removal of conditional status. Thus, the Board either misinterpreted or failed to have regard to the relevant U.S. law on this point.

[14] The Respondent relies on a number of cases to support his position. Those cases can be distinguished. For example, as in *Hassanzadeh*, above, the Applicants in this case claim that their residency status has expired. However, the similarities end there. In *Hassanzadeh*, the Iranian claimant was the estranged wife of a naturalized German citizen of Iranian origin. They had a child who was a German citizen by birth. The claimant's "unlimited right of residence" had expired and there was some question as to whether her residence would be considered abandoned due to her long absence from Germany. However, the balance of evidence clearly demonstrated that "[i]n case Mrs. Hassanzadeh will decide to live in Germany again, she is allowed by law to do so" (at para.

13) and “there would seem to be no problem for the adult applicant to renew her residency status in Germany, especially because of her son” (at para. 15).

[15] Another similar, yet distinguishable, situation occurred in *Hadissi v. Canada* (*Minister of Citizenship and Immigration*), [1996] F.C.J. No. 436 (T.D.), where the claimant alleged that her U.S. permanent residence status was conditional and had been revoked. However, the evidence indicated that the claimant had fabricated the conditional status of her residency. Associate Chief Justice Jerome stated at para. 14 that:

> [C]ogent evidence from American and Canadian immigration officials established that Ms. Hadissi's permanent resident status was active and current. Unlike the Mahdi case, therefore, the evidence here did not demonstrate that there was a serious possibility that American authorities would no longer recognize her as a permanent resident and deny her the right to return to the United States.

[16] Having carefully reviewed the record and arguments of the parties, I conclude that a *prima facie* case was not made out by the Minister and the Board erred in its decision on the issue of exclusion. However, a conclusion that the Board erred on this issue is not necessarily determinative of this claim. If the Board’s decision on the “Inclusion” is correct, the decision will be upheld regardless of any errors in the “Exclusion” issue.

***Issue #2*: *Did the Board err by finding that Ms. Romero was not credible or had not established a well-founded fear of persecution*?**

[17] The Applicants question three areas of the Board’s decision. In summary form their arguments are as follows:

- The Board erred in finding that there was no evidence to connect the expulsion of Ms. Romero's father from his farm by FARC guerrillas to possible FARC persecution in Bogotá. The Board failed to consider evidence that the threats were based on the father's position as a retired police officer and an outspoken activist. The Board also erred by finding that there was insufficient evidence to identify the agents of persecution as FARC guerrillas. There was a link to FARC's expulsion of the father from his farm, the father's community activity, as well as FARC's well-known persecution of community activists.

- The Board was wrong to draw a negative credibility inference from Ms. Romero's identification of the threatening callers and of the agents of persecution. Ms. Romero stated that she did not know in certain terms the identity of her persecutors, but that she was willing to infer their identities based on reasonable links to her father's activities. The Board also erred by finding that Ms. Romero had identified paramilitaries as an agent of persecution. The Board found that Ms. Romero had done so in order to connect her claim to atrocities committed by those paramilitaries (that is, the murder of 60 community activists in 2001, which was documented in a newspaper article). Ms. Romero had only recently found the article discussing the paramilitaries' activities, but there were other reasons upon which the Applicant and the Board could objectively find that the paramilitaries were agents of persecution. The reasons include that they were active in her father's community and that her father was a community activist.

- It was unreasonable for the Board to rely on the evidence that none of the Applicants' family members had been harmed. The adult Applicant testified that her siblings did not

> live with her father and that the whole family moved around, and that her father was armed and able to protect himself. The Board misconstrued the evidence as a claim that the persecutors were threatening the Applicant's entire family, when it was clear that only Ms. Romero and her daughter were the focus of threats, in order to put pressure on the father.

[18] Adverse credibility findings and a finding that a well-founded fear has not been demonstrated are questions of fact. As such, the appropriate standard of review is patent unreasonableness. That is, this Court should defer to the Board's expertise and only intervene if the Board based its decision on an erroneous finding of fact that was made in a perverse or capricious manner or without regard to the evidence before it.

[19] In my view, the Applicants simply dispute the manner in which the Board interpreted and weighed the evidence on both sides of the issue. The Applicants have put forward alternative explanations and interpretations of the evidence before the Board. However, when the standard of review is, as here, one of patent unreasonableness, it is not sufficient to present an alternative line of reasoning. Rather the Applicants must establish that the conclusion of the Board is not supported, in any way, by the evidence (*Sinan v. Canada* (*Minister of Citizenship and Immigration*), [2004] F.C. J. No. 188 at para.11 (F.C.)). The Applicants have not established that the Board's conclusions were patently unreasonable or unsupported by the evidence.

[20] In particular, it was not unreasonable for the Board to take note that no member of the family, including the Applicants, had ever been attacked by FARC or the paramilitaries. This is relevant evidence in assessing the validity of a threat. Additionally, I do not agree with the

Applicants that the evidence they presented only indicates a threat against the two of them and no other family member. It is within reason for the Board to assess the threat as one against her family as a whole, given that the ultimate target of the alleged agents of persecution was the father. The Board also relied on the limited time period in which the threats were made, from October to December of 2001, in finding that there was no continuing interest in the Applicants' family. In addition, the Board also cited supporting evidence for its conclusion, based on the sophistication and effectiveness of FARC terror activities.

[21] In sum, the Board came to reasonable conclusions supported by the evidence and provided cogent reasons for its decision. The Board did not err on this issue.

Additional Issue

[22] In their further memorandum of argument, submitted after this Court's decision in *Thamotharem v. Canada* (*Minister of Citizenship and Immigration*), 2006 FC 16, the Applicants added a third issue. That issue is whether the Board erred by applying the IRB Chairperson's Guideline 7, which Guideline was found by the Court in *Thamotharem* to fetter the discretion of Board members. The Applicants concede that they did not raise the issue of Guideline 7 at the Board hearing. Further, they acknowledge that there does not appear to be any unfairness in the manner in which the hearing was conducted.

[23] Following the decision in *Thamotharem*, above, a number of Court files, with IMM-9766-04 as the lead file, were consolidated for purposes of hearing and determining the Guideline 7 issue (Order dated February 20, 2006). That hearing was held before Justice Mosley on March 7 and 8,

2006 (the Consolidated hearing). The question raised by the facts of this application is whether, by not objecting to the use of Guideline 7 at the hearing, the Applicants have waived their right to raise this issue at the judicial review stage. This issue, while not considered by the Court in *Thamotharem*, was before the Court in the Consolidated hearing. In light of this, the parties agreed to be bound by the decision of Justice Mosley, including the possibility of certification of a question.

[24] The decision of Justice Mosley was released on April 10, 2006 (*Benitez v. Canada* (*Minister of Citizenship and Immigration*), 2006 FC 461). In his decision, he dismissed all of the applications for judicial review with respect to the Guideline 7 issues. Of particular relevance to the facts in this application, Justice Mosley concluded as follows, at para. 237:

> The common law principle of waiver requires that an applicant must raise an allegation of bias or a violation of natural justice before the tribunal at the earliest practical opportunity. If counsel were of the view that the application of Guideline 7 in a particular case would result in a denial of their client's right to a fair hearing, the earliest practical opportunity to raise an objection and to seek an exception from the standard order of questioning would have been in advance of each scheduled hearing, in accordance with Rules 43 and 44, or orally, at the hearing itself. A failure to object at the hearing must be taken as an implied waiver of any perceived unfairness resulting from the application of the Guideline itself.

[25] On this point, I adopt the reasoning of Justice Mosley and the conclusion. The Applicants' failure to raise the Guideline 7 issue at the hearing before the Board must be taken as an implied waiver of any perceived unfairness resulting from the application of Guideline 7.

Conclusion

[26] In conclusion, while I find that the Board erred in its finding on "Exclusion" under Article 1(E) of the Refugee convention, I am satisfied that the Board did not err in its "Inclusion" determination. On the issue of the applicability of the conclusions of the Court in *Thamotharem*, above, I find that the Board did not err by applying Guideline 7.

[27] Neither party proposed a question for certification on either of the first two issues. Questions were certified in both *Thamotharem*, above, and in the Consolidation hearing, which questions have direct relevance to the application before me and which will be certified for purposes of this judicial review. I adopt the questions certified by Justice Mosley in *Benitez*, above, as questions to be certified in this application.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed with the following questions certified as serious questions of general importance:

1. Does Guideline 7, issued under the authority of the Chairperson of the Immigration and Refugee Board, violate the principles of fundamental justice under s. 7 of the *Charter of Rights and Freedoms* by unduly interfering with claimants' right to be heard and right to counsel?

2. Does the implementation of paragraphs 19 and 23 of the Chairperson's Guideline 7 violate principles of natural justice?

3. Has the implementation of Guideline 7 led to fettering of Refugee Protection Division Members' discretion?

4. Does a finding that Guideline 7 fetters a Refugee Protection Division Member's discretion necessarily mean that the application for judicial review must be granted, without regard to whether or not the applicant was otherwise afforded procedural fairness in the particular case or whether there was an alternate basis for rejecting the claim?

5. Does the role of Refugee Protection Division Members in questioning refugee claimants, as contemplated by Guideline 7, give rise to a reasonable apprehension of bias?

6. Is Guideline 7 unlawful because it is *ultra vires* the guideline-making authority of the Chairperson under paragraph 159 (1) (h) of the *Immigration and Refugee Protection Act*?

7. When must an applicant raise an objection to Guideline 7 in order to be able to raise it upon judicial review?

"Judith A. Snider"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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