Date: 20061025

Docket: IMM-7097-05

Citation: 2006 FC 1264

Ottawa, Ontario, the 25th day of October 2006

Present: The Honourable Mr. Justice de Montigny

BETWEEN:

RODOLFO MANUEL TORRES RICO QUEVEDO
VIRIDIANA ROJAS BARRIOS

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The principal applicant, Rodolfo Manuel Torres Rico Quevedo, and his wife, Viridiana Rojas Barrios, arrived in Montréal on February 21, 2005, and claimed refugee protection a few days later, on February 24, 2005. They allege being persecuted in Mexico, their country of origin, by reason of their membership in a particular social group, namely, the family. They also claim to be "persons in need of protection" within the meaning of subsection 97(1) of the *Immigration and Refugee Protection Act* (IRPA).

[2] In a decision dated November 1, 2005, the Refugee Protection Division of the Immigration and Refugee Board (the Board) concluded that the applicants were not Convention refugees or persons in need of protection and accordingly rejected their claim. These reasons concern the application for judicial review of this decision, which was presented by the applicants.

FACTS ALLEGED BY THE APPLICANTS

[3] The principal applicant is a member of a family that has been in the coffee plantation business for generations. On January 19, 2005, he was allegedly abducted by three armed individuals who he claims are police officers, since the blanket they used to cover him when he was abducted bore the initials of the judicial police. The applicant also states that his kidnappers spoke in code and used a car radio while driving, thus proving that they were police officers.

[4] His kidnappers allegedly assured him that nothing would happen to him if his family and spouse co-operated and paid the ransom demanded. He was then locked up in a windowless room for several days. The day after his abduction, two kidnappers wearing hoods allegedly gave him a telephone so he could call his spouse and relay the ransom demand to her. One week later, the ransom having apparently been paid, he was blindfolded, taken to a deserted spot, and released.

[5] The applicant states that, the next day, he went to the office of the state prosecutor to file a complaint against his kidnappers. When he mentioned having been abducted by the judicial police, he was supposedly told that this was a very serious accusation and that it would be better if he left or otherwise he would be arrested.

[6] In the ensuing days, the applicant and his spouse allegedly received threatening telephone calls during which it was mentioned that the caller knew that the applicant had tried to file a complaint. They then decided to flee and to take refuge in another state in Mexico, but a few days later, the principal applicant's spouse allegedly received a call on her cellular telephone telling them that she and her husband would be found and killed.

[7] Fearing for their lives, the applicants immediately applied for passports and fled for Canada as soon as they managed to put together enough money to do so.

THE DECISION OF THE BOARD

[8] The Board rejected the claims for refugee protection presented by the applicants, for two reasons. First of all, the Board was of the opinion that several aspects of the applicants' narrative were implausible and undermined their credibility. Secondly, the Board concluded that the applicants had not succeeded in rebutting the presumption that the Mexican authorities were able to ensure their protection.

[9] In the Board's findings regarding the applicants' credibility, the following "implausibilities" were noted:

- The kidnappers supposedly kidnapped the applicant without masking their faces but subsequently wore hoods to ask him to call his wife;
- The applicant stated having lost all track of time because he was detained in total darkness, but in his Personal Information Form (PIF), the applicant writes that his kidnappers gave him a telephone [TRANSLATION] "the next morning";
- When asked to explain why she had not contacted the police, the female applicant answered that she feared the kidnappers. However, at that time, she did not yet know her husband had been kidnapped;
- When pressed by the panel to provide information about the ransom to be paid to save her husband, the female applicant first replied that she was to drop off 500,000

pesos in a service station washroom as soon as possible. She then revised her story, saying that she had to deliver the money on a Wednesday evening, at 9:00 p.m. The panel found it to be implausible that the kidnappers would demand the payment of such an amount without specifying the exact moment when it was to be paid, considering the risk that any person using the washroom could discover the money and leave with it;

- Finally, the Board noted that the applicant stated that he had received four calls from his kidnappers after his release, whereas he only mentioned two calls in his PIF.

[10] On the question of state protection, the Board briefly referred to the documentary evidence in the National Documentation Package on Mexico, which describes the efforts made by the government of Mexico to eliminate corruption, and concluded that "the male claimant did not make every effort to obtain the state's protection from the police officers, if his story is true." Relying on *Kadenko v. Canada (Minister of Citizenship and Immigration)* (1996), 143 D.L.R. (4th) 532 (F.C.A.), [1996] F.C.J. No. 1376 (QL), the Board ruled that a claimant has to do more than simply show that he or she approached some members of the police and that his or her efforts were unsuccessful, at least where a state's institutions are democratic.

ISSUES

[11] Essentially, three issues are raised in this application for judicial review:

- What standard of review is applicable in this case?
- Did the Board err in concluding that the applicants are not credible?
- Did the Board err in concluding that the applicants had adequate state protection in Mexico?

ANALYSIS

[12] It is trite law that the standard of review applicable to issues of credibility is patent unreasonableness. The reason is that the Board is generally in a better position to assess and appreciate the credibility of testimony. This being said, it must be acknowledged that the patent

unreasonableness of a finding based on the plausibility of a statement, and therefore on the logic itself of an affirmation, will be easier to determine upon judicial review than the attitude or behaviour a person may have had before the Board. In the first case, the assessment will be more objective; in the second, it will be based on rather more subjective facts which are not necessarily apparent on the face of the record. The applicant's burden of proof will be the same in both cases, but the evidence may be simpler to identify in the first case. As the Federal Court of Appeal wrote in *Aguebor v. Minister of Employment and Immigration* (1993), 160 N.R. 315, [1993] F.C.J. No. 732 (QL):

> There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. In *Giron*, the Court merely observed that in the area of plausibility, the unreasonableness of a decision may be more palpable, and so more easily identifiable, since the account appears on the face of the record. In our opinion, *Giron* in no way reduces the burden that rests on an appellant, of showing that the inferences drawn by the Refugee Division could not reasonably have been drawn. In this case, the appellant has not discharged this burden.

[13] With regard to the standard of review applicable to the issue of whether or not the applicant was able to claim state protection, I have already written in a previous decision, *Villasenor v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1080, [2006] F.C.J. No. 1359 (QL), that I concur with the analysis of my colleague Madam Justice Tremblay-Lamer in *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, [2005] F.C.J. No. 232 (QL), to the effect that the applicable standard of review in such a case is reasonableness *simpliciter*. In fact, I note that most of my colleagues have reached similar conclusions in a series of recent decisions: for example, in *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359,

[2006] F.C.J. No. 439 at paragraph 23 (F.C.) (QL); *Fernandez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1132, [2005] F.C.J. No. 1389 at paragraphs 11 and 12 (F.C.) (QL); *Monte Rey Nunez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1661, (2005) 144 A.C.W.S. (3d) 715, [2005] F.C.J. No. 2067 at paragraph 10 (F.C.) (QL).

[14] What about the findings of implausibility reached by the Board with regard to various aspects of the testimony given by the applicants in this case? After carefully rereading the transcript of the hearing held by the Board on October 3, 2005, as well as the PIF filled out by the applicants, I concluded that the Board erred in its assessment of the applicants' credibility and drew inferences from their testimony which are more akin to speculation than rational analysis.

[15] When assessing an applicant's credibility, it must be presumed that allegations made under oath are true, unless there are serious reasons which lead the decision-maker to doubt their truthfulness: *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (F.C.A.), [1979] F.C.J. No. 248 (QL); *Miral v. Canada (Minister of Citizenship and Immigration)* (1999), 86 A.C.W.S. (3d) 1117, [1999] F.C.J. No. 254 (QL). It is therefore only with great caution that an administrative tribunal may find a narrative to be implausible. It is only in the clearest of cases—for example, when there are internal contradictions in the testimony of a claimant—that such a finding may be made. This caution is particularly important where a claimant comes from a country where the culture and customs are different than ours, as several judges of this Court have taken pains to underline. Mr. Justice Muldoon reiterated this case law when he wrote the following at paragraph 7 of *Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, [2001] F.C.J. No. 1131 (QL):

> A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu . . . .
>
> See also to the same effect: *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.), [1993] F.C.J. No. 497 (QL); *Miral v. Canada (Minister of Citizenship and Immigration), supra*; *Bastos v. Canada (Minister of Citizenship and Immigration),*2001 FCT 662, [2001] F.C.J. No. 992 (QL); *Sun v. Canada (Minister of Employment and Immigration)* (1993), 24 Imm. L.R. (2d) 226 (F.C.), [1993] F.C.J. No. 812 (QL).

[16] Considering these principles, I do not find the applicants' narrative to be implausible. It may well be that the facts mentioned at the hearing and in their PIF might not on some points correspond to the idea one may have of a kidnapping and a ransom demand. However, account must be taken of the erratic nature this abduction may have had and the possible lack of experience of the kidnappers, as well as of a possibly different *modus operandi* in this region of Mexico. In any event, I saw nothing in the applicants' allegations which could be termed implausible and which would undermine their credibility to such an extent that their claim must be rejected.

[17] For example, let us consider the apparent contradiction between the fact that the kidnappers did not cover their faces at the time of the abduction and then masked themselves when they entered the room where the applicant was being held. The Board ruled that such behaviour was implausible and undermined the applicant's credibility. However, this is not the type of contradiction which

necessarily shows an intent to mislead the panel. It is easy to conceive that the persons who kidnapped him were not the same as those who visited him during his detention, or that the kidnappers did not think it useful to wear masks at the time of the abduction because the applicant would only see them for several seconds and they would attract less attention this way. It is even possible that the kidnappers simply made a mistake by not wearing masks when they abducted the applicant. In fact, all kinds of possibilities may be imagined to explain this apparent contradiction.

[18] The applicant cannot be required to explain the conduct of his kidnappers. To the extent that his narrative does not contain any objectively verifiable inconsistencies or internal contradictions which cannot be explained in any way, one must refrain from concluding that an applicant has no credibility by reason of implausibility.

[19] It seems to me that the same thing may be said about all the other “implausibilities” noted by the Board in its decision. The applicant was criticized for having spoken about the [TRANSLATION] “next day” and “morning” in his narrative, even though he admitted having lost all track of time. There is nothing unusual about that. As he stated in answer to a question put to him, he relied on his biological clock and on the fact that he thought he slept at night to keep track of time. He could therefore write in good faith in his PIF that he had heard a conversation [TRANSLATION] “one day in the morning” on the basis of the fact that he had just woken up.

[20] It is true that in other parts of his narrative the applicant referred to a specific number of days (the next day, one week later). Likewise, at the hearing, he was asked after approximately how much time he was given a telephone, to which he answered [TRANSLATION] “I don’t know, four (4)

days. It's just that I lost track of time, because I was locked up", Tribunal Record, page 13. The applicant obviously did not know for precisely how long he had been detained, and his references to time could only be approximate. In fact, he acknowledged this without any hesitation, as is shown in the following short excerpt of an exchange between a panel member and the applicant:

> [TRANSLATION]
>
> Q. Approximately how long after your arrival were you given a telephone?
>
> A. I don't know, four (4) days. It's just that I lost track of time, because I was locked up
>
> - Hmm, hmm. That's precisely what I'm wondering about—at paragraph 12 of your Personal Information Form, you state:
>
> > "The next day, the two (2) kidnappers came into the room wearing hoods and holding a pistol; they said they would give me a telephone".
>
> Q. How did you know it was the next day—you were in a windowless room, there was no clock, and your hands were tied?
>
> A. Because of the notion of time, you very well know that no more than one day went by.
>
> - Hmm, hmm.
>
> BY THE PRESIDING MEMBER (to Subject No. 1)
>
> - Sir, you told us I can't say how much time they gave, after how much time I was there when they gave me a telephone, because I lost track of time. And all of a sudden you just got it back. In fact, you got it back very easily in your narrative.
>
> A. Yes, but on that day they sat me down. The day they put me in the room, you don't count the hours, but you know that about one day went by . . .
>
> BY THE REFUGEE PROTECTION OFFICER (to Subject No. 1)
>
> Q. No, but did you just testify . . . ?

A. . . . logically

Q. How?

A. Logically.

- O.K.

Q. Did you not just testify that it was four (4) days later?

A. . . . No, I meant to say that days went by but I don't know how many days. But in my narrative I put that it was the next day, but maybe it wasn't the next day, but it could have been the day after, precisely because of the sense of time, I may have made a mistake.

BY THE PRESIDING MEMBER (to Subject No. 1)

Q. And this morning it was how much time?

A. I couldn't tell you because I didn't have a watch, no calendar, I couldn't see the light.

- So therefore you confirm your first version, to the effect you lost track of time.

A. Yes.

BY THE PRESIDING MEMBER (to the Refugee Protection Officer)

Q. So Mr. Colin, you say that he said four (4) days later?

A. That's what I understood from the testimony he just gave.

BY THE PRESIDING MEMBER (to Subject No. 1)

Q. Is that what you said, sir?

A. Yes, that is what I told the officer. But precisely because I had lost track of time, it could have been one (1) day or two (2) days.

- Hmm, hmm. But your sense of time seems to have come back to you when you wrote your narrative.

> A. I wrote that because maybe one (1) or two (2) days went by, but it would have been better to say that I didn't know because I didn't know how many days were involved.
>
> - And so this morning your version is different, naturally, from what you wrote in your narrative.
>
> A. . . . Well, in the narrative, I maybe put, yes, it could have been one (1) day, but I made a mistake.

[21] What I understand from this exchange is that, as the days went by, the applicant could only have a vague notion of time and that his references to time and duration were only approximations. He specifically admitted it before the Board, and his explanations do not seem to me to be completely implausible. After all, it is not a rare event that a person gives details he or she cannot reasonably provide, not for the purposes of supporting the narrative, but because that person simply believes he or she must be as specific as possible for fear of not being believed.

[22] The Board also dealt at length with the manner in which the ransom was supposed to be paid and criticized the female applicant for having contradicted herself by stating first of all that the ransom had to be paid as soon as possible, without setting a specific time, and then stating that she paid the ransom Wednesday evening at 9:00 p.m. With respect, I do not see any contradiction in this excerpt from her testimony. Far from tailoring or changing her testimony, the female applicant actually answered two questions: when she was supposed to pay the ransom, and when she actually did so. I do not see any inkling of a contradiction.

[23] With regard to the fact that it may seem surprising that the kidnappers did not set a specific time to pay the ransom, it is not up to the Board to speculate on their methods. It is possible that the

place where the money was to be paid, a washroom in a service station, was a quiet place and that the garage operator who kept the key to the washroom was an accomplice of the kidnappers. Once again, it was not up to the Board to speculate on the methods generally used by kidnappers in similar circumstances, especially considering that we know nothing about local practices in this region of Mexico.

[24] It does not seem to me to be necessary to examine all the other “implausibilities” noted by the Board in its decision. It seems to me that they all have the same defect which I identify in the analysis I have just made. The Board concluded that the applicants were not credible on the basis of minor contradictions (whether the female applicant called the hospital or went there, whether the principal applicant received three or four threatening calls) and non-existent ones (the female applicant could in fact believe that her husband had been kidnapped even before the ransom demand was made, considering the prevalence of these events in Mexico).

[25] The last remaining question is the Board’s conclusion concerning the state protection available to the applicants. They alleged that the Board read the documentary evidence superficially and ignored recent articles confirming that corruption is widespread in the Mexican police and that police officers are sometimes involved in kidnappings and demands for ransom. The applicants also submitted that the Board examined the situation in Mexico from a narrow, legalistic point of view, gave undue significance to government attempts to end abuses of police power, and failed to consider the tangible results of these attempts.

[26] I agree with my colleague Mr. Justice Martineau when he stated that the Board must take into consideration an applicant's personal situation, the specific risk alleged, the identity of the persecutor, and the situation prevailing in the country or region where the threats were made. In other words, the Board must conduct a detailed analysis rather than make a glib statement as to whether a given state can or cannot provide protection. In this respect, the Board must not be satisfied with good intentions: the person claiming to fear for his or her life or physical integrity must be able to count on tangible results. I therefore entirely agree with what Martineau J. wrote at paragraph 29 of *Avila v. Canada (Minister of Citizenship and Immigration), supra*:

> Accordingly, when the government is not the persecuting agent, and even when it is a democratic state, it is still open to an applicant to adduce evidence showing clearly and convincingly that it is unable or does not really wish to protect its nationals in certain types of situation: see *Annan v. Canada (Minister of Citizenship and Immigration*, [1995] 3 F.C. 25 (F.C.T.D.); *Cuffy v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1316 (F.C.T.D.) (QL); *Elcock v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1438 (F.C.T.D.) (QL); *M.D.H.D. v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 446 (F.C.T.D.) (QL). It should be borne in mind that most countries might be prepared to try to provide protection, although an objective assessment could establish that they are not in fact able to do so in practice. Further, the fact that the applicant must place his life at risk in seeking ineffective state protection, simply in order to establish such ineffectiveness, seems to be contrary to the purpose of international protection (*Ward, supra*, at paragraph 48).

[27] In the case at bar, I am of the opinion the Board did not sufficiently take into consideration the fact that the alleged persecutors were police officers. Not only did their colleagues discourage the applicants from laying a complaint, but they even tipped off the alleged kidnappers, who lost no time making death threats against the applicants. In these circumstances, it was not unreasonable to stop seeking state protection and flee the country as soon as possible. In fact, it would be illogical to

do otherwise, as Mr. Justice La Forest stated in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at page 724:

> . . . [I]t would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.
>
> See also: *Chaves v. Canada (Minister of Citizenship and Immigration), supra*; and *Espinosa v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1393, [2005] F.C.J. No. 1737 (QL).

[28] For all these reasons, I am therefore of the opinion that the application for judicial review must be allowed and that the case must be referred back to a differently constituted panel for redetermination of the applicants' claim in light of this order. Counsel did not suggest any serious question of general importance for certification.

JUDGMENT

THE COURT ALLOWS the application for judicial review, sets aside the Board's decision dated November 1, 2005, and refers the applicants' case back to a differently constituted panel for rehearing and redetermination. No serious question of general importance is certified by the Court.

"Yves de Montigny"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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