Date: 20071126

Docket: IMM-1902-07

Citation: 2007 FC 1220

Ottawa, Ontario, the 26th day of November 2007

Present: the Honourable Mr. Justice Blais

BETWEEN:

ADRIAN EDROSO MORALES

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Refugee Protection Division (the Division) of the Immigration and Refugee Board (the Board) on April 4, 2007 by which the Division concluded that the applicant was neither a Convention refugee nor a person in need of protection pursuant to section 97 of the *Immigration and Refugee Protection Act*, S.C. 1996, c. 27 (the Act).

RELEVANT FACTS

[2] The applicant Adrian Edroso Morales is a citizen of Mexico and of Spain. He arrived in Canada on December 8, 2005 and applied for refugee status on that day.

[3] The applicant lost everything in hurricane Wilma and considered that his life was threatened in Mexico because of his inability to adapt to the corruption and the exploitation prevailing in the workplace.

[4] As his parents were Basques, he said he could not return to Spain for fear of being persecuted as his parents were before leaving Spain to take refuge in Mexico.

IMPUGNED DECISION

[5] Donald Archambault (the member) rendered an oral decision on April 3, 2007 by which he denied the applicant refugee status on the ground that the real reason for his refugee status application was economic and the applicant had even admitted he wanted to go back to Mexico so he could see his family once he was working in Canada.

ISSUE

[6] Did the persuasive decisions published by the Board interfere with the member in the exercise of his discretion?

STANDARD OF REVIEW

[7] As John M. Evans J.A. recently noted for the Federal Court of Appeal in *Kozak v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, at paragraph 44, the standard of review applicable to questions of procedural fairness is that of correctness:

> Whether a tribunal's decision was made in breach of the duty of procedural fairness, including the requirement of impartiality, is determined by a reviewing court on a standard of correctness.

ANALYSIS

[8] It appeared from the record under review that the member dismissed the refugee status claim based on the oral evidence submitted to him. The member said the following:

> In his testimony, the claimant stated that he came to Canada for economic reasons and, therefore, to find a job.
>
> Counsel stated that it was not up to the claimant to decide on matters of law, but one thing is certain: all the evidence before the panel shows that this really is the case with respect to the claimant.
>
> The claimant even stated that if his shop had not been destroyed by Hurricane Wilma, he most probably would not be in Canada.
>
> The claimant came to Canada in 2004, and he did not make a claim for refugee protection at that time. In the panel's view, however, he could have done so.
>
> . . . Not only would the claimant not be subjected to a specific threat if he were to return to his country, but he also admits that he intends to return. He adds, however, that he would not return to work, but to see his family.

[9] Further, the immigration officer's notes made on December 8, 2005, indicate as the answer to question 18 titled "Any other information provided by the claimant", the following: "no fear to

return to Mexico or to go to Spain", and "does not want to go to Spain because he does not know anyone there". This evidence supports the decision made by the member.

[10] Although I do not think it is necessary to dwell at length on the fact that the member exercised his discretion based on the evidence put before him, I have to distinguish the facts in the case at bar from the decision relied on by the applicant in support of this application for judicial review.

[11] The applicant cited a passage which I was unable to find in the judgment of the Federal Court of Appeal in *Kozak, supra*. The end of paragraph 61 is however identical to the passage cited:

> Reading the e-mails exchanged among members of the senior management in the early stages, a person could reasonably conclude that the lead case strategy was not only designed to bring consistency to future decisions and to increase their accuracy, but also to reduce the number of positive decisions that otherwise might be rendered in favour of the 15,000 Hungarian Roma claimants expected to arrive in 1998, and to reduce the number of potential claimants. (Emphasis added.)

[12] The emphasized part of the quotation is the part unfortunately omitted by counsel for the applicant, who gave an overview of the major distinctions between the Federal Court of Appeal's judgment and the case now before the Court. In that judgment, very special facts were entered in the evidence regarding the lead cases created for Hungarian Roma claimants.

[13] First, the e-mails exchanged among members of senior management of the Board in the early stages were entered in evidence. Some of these e-mails indicated a concern regarding the

extreme number of decisions made in favour of Hungarian Roma claimants and a forecast of an increase in applications from Hungary.

[14] Second, the evidence was that the Board had not consulted the legal community specializing in immigration and refugee law before issuing lead cases that would guide members in dealing with the increasing number of applications from Hungarian Roma claimants. At the time, the lead cases represented an unannounced initiative by the Board. Further, it did not publicly explain this new departure until after the applications for leave to make applications for judicial review in cases to which the lead cases had been applied.

[15] Third, the final but not the least important distinction is the following: one of the members of the panel hearing the applications had also participated in creating the said lead cases.

[16] It should be noted that the Federal Court of Appeal was careful to point out the following in the final paragraph of *Kosak, supra*:

> I would only note that the decision in the present appeals does not necessarily mean that the factual conclusions in the lead cases are unreliable, or that subsequent decisions which have relied, to any extent, on the findings in the lead cases are thereby vitiated.

[17] As none of these facts was proven or alleged in the case at bar, I cannot rely on this decision as a basis for concluding that the member waived the exercise of his discretion in favour of the persuasive decisions published by the Board.

[18] The applicant directed the Court's attention to the fact that in his decisions the member mentioned that President Fox made and is still making efforts to resolve the problems of corruption in Mexico, though he has not held the presidency of that country since January 2006.

[19] It is worth citing in full the member's decision in response to this argument:

> The panel acknowledges that there is corruption, but since President Fox was elected, Mexico has been and is still making major efforts to solve this problem. It has instituted a number of reforms and mechanisms to fight corruption. With all due respect, it is false to claim or to state that there is full-blown corruption in Mexico.

[20] It is clear from reading this passage that the member did not say that President Fox is still making efforts, but rather that Mexico is making efforts to resolve the corruption problem and has been doing this since President Fox was elected. Further, the transcript of the hearing of April 3, 2007, at page 16, is even clearer in this regard, and I quote: [TRANSLATION] "there is corruption in the police, but the government since – since the election of Fox – and since the new president also, has made great efforts to deal with internal corruption . . .".

[21] Consequently, there is no indication that the member did not assess the evidence on Mexico.

[22] It was up to the applicant to show how the lead cases had interfered with his right to procedural fairness. In my opinion, it is clear that the member relied on the evidence presented to him in dismissing the applicant's refugee status application, and only mentioned the persuasive decisions of the Board at the very end of his decision as examples, as he in fact said himself, since his decision had already been fully supported by reasons.

[23] For these reasons, I dismiss the application for judicial review at bar.

[24] The parties submitted no question for certification.

JUDGMENT

1. The application for judicial review is dismissed.
2. No question will be certified.

"Pierre Blais"
Judge

Certified true translation

Brian McCordick, Translator

APPENDIX

APLICABLE LEGISLATION

***Immigration and Refugee Protection Act*, S.C. 2001, c. 27**

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

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

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

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

(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,

(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.

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

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

(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) 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

(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.

l'incapacité du pays de fournir des soins médicaux ou de santé adéquats

(2) A également qualité 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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-1902-07

STYLE OF CAUSE:

ADRIAN EDROSO MORALES

Applicant

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PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: November 20, 2007

REASONS FOR JUDGMENT AND JUDGMENT BY: THE HONOURABLE MR. JUSTICE BLAIS

DATED: November 26, 2007

APPEARANCES:

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