

Date: 20071206

Docket: IMM-499-07

Citation: 2007 FC 1284

Vancouver, British Columbia, December 6, 2007

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

BYRON ESTUARDO AMEZQUITA GALINDO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] In the present Application, the Applicant challenges a decision of the Refugee Protection Division of the Immigration and Refugee Board (RPD), dated January 16, 2007, excluding him from being considered a refugee by application of Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees (Convention)*. By application of that provision, the RPD found that there are serious reasons for considering that the Applicant has committed a serious non-political crime outside of Canada; the authorities in Guatemala have issued a warrant for the arrest of the Applicant on a charge of murder.

[2] The Applicant is a citizen of Guatemala. In his Personal Information Form (“PIF”) Narrative, the Applicant states that in Guatemala he was in the business of trading, buying and selling vehicles. In 2004, the Applicant started buying and selling vehicles in other countries, and in April 2004, he went to Honduras and purchased three vehicles which he took to Panama where he registered them and paid taxes and customs duties. In August 2004, the Applicant was arrested by the Panamanian police who found that one of the vehicles he purchased in Honduras was stolen and belonged to the recently murdered president of the National Institute of Electrification (INDE) in Guatemala. The Panamanian police informed the Applicant that they believed he was part of the plot to kill the president of the INDE and detained him until October 2004. The Applicant feared returning to Guatemala because he heard that Guatemalan Military Intelligence was looking for him, his family had received threats, and the media in Guatemala had been widely reporting that he killed the president of the INDE. The Applicant and his family fled to Honduras where they remained for five months before arriving in Canada to make a refugee claim.

[3] The Minister of Citizenship and Immigration (Minister) intervened in the RPD’s processing of the Applicant’s refugee claim with a request that the Applicant be found to be inadmissible under Article 1F(b).

[4] The central issue before the RPD was whether there are serious reasons for considering that the Applicant committed the murder. In support of the application under Article 1F(b) of the *Convention* the evidence produced before the RPD by the Minister consists of a warrant from Guatemala for the Applicant’s arrest, information from Interpol, newspaper reports from Guatemala

reporting that the Applicant is the murderer, and a “criminal record” for arrests in Guatemala and outstanding charges there for fraud. The Applicant denies committing the murder, and in the hearing before the RPD presented what is essentially an alibi defence. In addition, in support of his position that he is wrongly accused, the Applicant attacked the existence of an important piece of evidence used against him: he denies ever having been arrested in Guatemala. In addition, the Applicant tendered an official record dated June 15, 2006, issued by the “Judicial Body, Supreme Court of Guatemala” confirming that he does not have “a criminal record” for criminal convictions in Guatemala (Certified Tribunal Record (CTR), p.835) and his lawyer in Guatemala wrote a statement that as of June 1, 2006, the Applicant “has not been charged or tried, according to the procedural requirements of Guatemala” (Applicant’s Application Record, p.70). With respect to the existence or non-existence of an arrest record for the Applicant, fingerprint evidence linking the Applicant to such a record became an element of the RPD’s decision-making.

[5] Throughout the arguments placed before the RPD, and in the decision under review, the “arrest record” relied upon by the Minister is referred to as a “criminal record”. As a result, for continuity, the term “criminal record” is used in these reasons when referring to the alleged “arrest record” unless specified otherwise. The criminal record placed before the RPD by the Minister is as follows:

According to an email from Interpol Guatemala, the Claimant has the following criminal record in Guatemala (Ex. 7, pp.16-17):

29/02/1980, Arrested for violent aggression
30/10/2002, Arrested for special case of fraud, use of false documents and customs evasion
24/03/1996, arrested for illegal carrying of firearms
15/02/1994, arrested for misrepresentation of facts

19/01/1992, arrested for fraud involving cheques

01/11/2002, arrested for an unspecified offence

There are several arrest warrants for the Claimant in Guatemala in addition to the one dealing with Knox's murder:

1. customs fraud and use of falsified documents dated October 14, 2004, (Ex. 7, p.7);
2. customs fraud and use of falsified documents dated March 22, 2001, (Ex. 7, p.11);
3. fraud and misrepresentation dated November 4, 2000, (ex. 7, p.13).

(CTR, p.324)

[6] Given the nature of the evidence produced by the Minister and the Applicant on the Article 1F(b) issue, the RPD properly engaged in determining whether the Applicant is credible. Justice von Finckenstein's decision in *Qazi v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1024 at paragraphs 18 and 19 presents a cogent reason for this approach:

The Board has to satisfy itself that there are "serious reasons for considering that [the Applicant] has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee". Normally the Board does not inquire into the guilt or innocence of an applicant charged abroad (see *Moreno v. Canada (M.E.I.)* [1994] 1 F.C. 298). The existence of a valid warrant issued by a foreign country would, in the absence of allegations that the charges are trumped up, satisfy the "serious reasons for considering" requirement.

When, however, as in this case, the Applicant alleges that the charges are fabricated, the Board has to go further. It has to establish whether to accept the allegations or not. i.e. whether the Applicant is credible. If he is found to be credible, then the mere existence of a warrant may not be enough.

[7] The RPD agreed with the Minister's arguments that the Applicant is not credible as set out in the following passage from the reasons:

Included in both the Minister's and Counsel's submissions are extensive News articles in respect to Knox's murder and the outstanding warrant of the accused. The panel agrees with the Minister's representative that there were serious concerns in respect to the claimant's credibility, including his oral testimony.

The Minister's representative has detailed the claimant's criminal history which is included in the complete page 13 and on page 14 in the Minister's representative's submissions [CTR, p.324]. It states:

The Minister recognized that there is no evidence to establish the claimant was ever convicted for these offences. However, it is more than merely speculative that he committed these offences given the existence of outstanding warrants and records on Interpol. Accordingly, the Minister submits that little weight can be placed on the claimant's evidence, in particular the documentary evidence that he has provided. If he had been arrested and is currently wanted for using false documents, misrepresentation and fraud, it stands to reason that he may have fabricated documents to corroborate his refugee claim.

The panel agrees with the portion of the Minister's submissions that there are serious credibility concerns in regards to the claimant's oral and written testimony pertaining to his presence in Panama during Knox's murder:

[...]

(Emphasis added)

(Decision, p.8)

[8] Thus it is obvious that the criminal record alleged by the Minister played a central role in the negative credibility finding made, which, in turn, is central to the Article 1F(b) decision rendered.

[9] It is agreed that Counsel for the Applicant's written argument, with minor amendment, provides a concise description of the conduct of the criminal record issue as follows:

The Applicant indicated at the outset of his claim that he was very concerned that the government of Guatemala might have produced a false criminal record for him in the course of its efforts to hold him responsible for the murder of Mr. Knox. In his Personal Information Form, filed on 7 June 2005, he stated that "the government and the police forces in my country are corrupt and I knew that I would be made a scapegoat. I am afraid that the government of Guatemala has invented a criminal record for me".

Certified Tribunal Record (CTR), p.349

At an early stage, the Minister also focused on the importance of a criminal record with respect to the claimant. In its "Notice of Intention to Participate" dated 9 February 2006, the Minister stated that in her opinion the Applicant was complicit and/or had committed serious non-political crimes and that her opinion was based in part on the fact that according to a national newspaper the claimant had been accused by the Guatemalan authorities of at least nine judicial processes, including murder.

CTR, p.744

Furthermore, in her disclosure to the Board dated 5 June 2006, the Minister provided the Board with a number of documents including a copy of an email which stated that the Applicant had an extensive criminal record in Guatemala dating back to 1980, which included arrests for "violent aggression" when the claimant was eight years old, fraud, use of false documents, customs offences, illegal carrying of firearms, misrepresentation of facts, fraud involving cheques, and in 2002 of an arrest for "an unspecified offence."

CTR, p.765

On 20 June 2006, the Applicant wrote to the Board enclosing a criminal record check that he had obtained from Guatemala and which indicated that he did not have a record for criminal convictions.

CTR, p.835

In the letter of June 20th the Applicant asked for a postponement of the hearing so that the competing documents could be checked and so that the Minister's representative could be allowed to provide some evidence based on fingerprints that the Applicant is the person mentioned in the criminal record. In the alternative, the Applicant requested that the criminal record submitted by the Minister be excluded from consideration for lack of reliability and extreme prejudice against the Applicant's credibility.

CTR, p.834

By letter dated 26 June 2006, the Board denied the Applicant's request for a postponement.

CTR, p.222

When the hearing got underway on 28 June 2006 the Applicant renewed his request for a postponement. The Board denied this request stating, "if any further time was needed with respect to fingerprints ... that further time would be given..."
(Emphasis added)

CTR, p.76

The Board then asked the Minister if "... you are able to find out any information as to whether there is fingerprinting done in Guatemala." The Minister responded that she had spoken to her enforcement officers and that to the best of their knowledge there was not a fingerprint database in Guatemala but that she intended to look into the matter further.

CTR, p.76

The Applicant's counsel then indicated to the Board that the Applicant was adamant that he had never been arrested in Guatemala, that he had no criminal record and that the Guatemalan authorities did take fingerprints when anyone was arrested, and that finally, the whole issue was extremely relevant. Since [sic] if the Applicant was shown to be telling the truth it would go a long way to buttressing his other claims of innocence and of non-involvement which rested in part on his own credibility.

CTR, pp.79-80

However, later in the hearing the Minister defended the alleged criminal record saying, “aside from the charge of violent aggression, the documents have more consistencies than inconsistencies. I mean with the respect to the charges of fraud and misrepresentation, there are indications in the news articles that the claimant had some history with the police, more than what he’s told us.”

CTR, p.85

The member also questioned the Applicant directly, under oath, and asked him if he had ever been fingerprinted in Guatemala. The Applicant stated that he had not been fingerprinted in Guatemala because he was never arrested there.

CTR, p.83

After hearing further submissions from the Minister, the Board reiterated its denial of the request for postponement stating however, he would afford further time if needed before making a decision.

CTR, p.90

Later in the hearing on cross-examination the Minister returned to the question of the alleged criminal record and cross-examined the Applicant extensively on that issue. The Minister attempted to impugn the Applicant’s credibility when he denied ever having been arrested in Guatemala. The Applicant maintained that he had never been arrested there.

CTR, p.148-153

At the end of the day, before adjourning the hearing to 9 August 2006, the Board Member asked the Minister to look into the question of whether the Guatemalan authorities took fingerprints. The Applicant then said to the Board Member “I believe the fingerprints will be something very important for the judge to have. I thank you for having requested that”.

CTR, p.164

On 4 July 2006, the Minister wrote to the Board strenuously objecting and in effect refusing to follow the direction of the Board

that she try to obtain fingerprint evidence. She stated that such evidence was irrelevant and unnecessary and completed by saying “if the Board or counsel could explain the probative value of a fingerprint analysis I will gladly assist.”

CTR, p.868

On 31 July 2006, the Board responded to the Minister’s letter saying that her argument could be addressed after resumption of the hearing.

CTR, p.210

The same day, on 31 July 2006, the Minister wrote again to the Board, this time requesting a postponement. Her letter stated that she had just received police incident reports **and fingerprints from Guatemala and Panama regarding the principal claimant**. She requested time to translate these documents from the Spanish. She added that **the police reports and fingerprints will likely provide further information regarding the veracity of the civil charges against the principal claimant**.

(Emphasis added in the original)

CTR, p.871

On the same date, the Minister disclosed further documents including a statutory declaration, which stated that the Guatemalan authorities had a central registry where they keep fingerprints and pictures of persons charged of any crimes and that they could compare the fingerprints and pictures that Canada would send them to their database.

CTR, p.887

On 21 August 2006, the Minister provided further disclosure. This disclosure included fingerprint evidence from Panama, but not from Guatemala. The documents of Guatemala consisted of confirmation that the Applicant had arrest warrants issued against him dating back to 2000 but this was not supported by any fingerprints confirmation.

(Emphasis added)

CTR, p.927

The hearing resumed on 1 November 2006 when the following exchange took place:

PRESIDING MEMBER: And you seem to be strongly objecting to the request you had put for the analysis of the claimant's fingerprints. I listened to the ending of the tape of the last hearing date. I think at first I had written down that I was asking just basically any information on the normal procedure of taking fingerprints but had stated it would be useful, obviously, if we had had the information, but that was just my own -- and I think the request was more from counsel. But we have all that information now --

MS. CHAN: Yes

PRESIDING MEMBER: -- in any case.

MS. CHAN: Yeah.

PRESIDING MEMBER: But it just seemed to be very strong objections from the Minister's representative that we were even asking for this information in the first place. Did you wish to comment further or has the matter been dealt with?

MS. CHAN: I think the matter's been dealt with, yeah.

PRESIDING MEMBER: Counsel, did you wish to make any comments?

MR. DANTZER: Well, in part, I guess. The -- I think -- I don't know if now is the time for submissions on exactly what the Minister's disclosure of -- the most recent disclosure of I guess the 21st of July is, but it does have some information with respect to the fingerprints.

PRESIDING MEMBER: Right.

MR. DANTZER: But of course it doesn't have the key part, which in other words, there are fingerprints from Panama --

PRESIDING MEMBER: Right

MR. DANTZER: -- which is really not in issue and there --

PRESIDING MEMBER: I assumed we were going to have the opportunity for --

MR. DANTZER: To do that later. Sure.

PRESIDING MEMBER: I'd prefer if that would be questions today.

MR. DANTZER: Yeah.

(Emphasis added)

CTR, pp.5-6

At the conclusion of the hearing the Board Member, after speaking off the record to get a date for resumption in order to hear oral submissions, declared that submissions would be in writing.

CTR, p.71

The Minister's representative submitted a lengthy twenty-page submission on 14 November 2006. In those submissions the Minister

wrote at some length on the Applicant's alleged criminal record in Guatemala, stating that the Applicant had failed to disclose it on his Personal Information Form and invited the board to draw a negative inference with respect to this credibility. The Minister also made no mention of the fact that the purported criminal record was not supported by fingerprints.

CTR, p.324

The Applicant submitted his written submissions on 28 November 2006. In those submissions he again raised the issue of the fact that the alleged criminal record was not supported by fingerprints, and stated that the Minister's own evidence established that fingerprint evidence was available and the Minister had been unable or unwilling to provide any evidence that the claimant had ever had his fingerprints taken in Guatemala. The Applicant then argued that a government who would prepare a false criminal record would not likely be too concerned with the niceties of issuing a properly based arrest warrant.

CTR, pp.307-308

On 1 December 2006, the Minister provided a reply to the Applicant's submissions; she stated in response to the issue of the lack of fingerprints "it is not incumbent on the Minister to prove that the civil record is valid. The Minister has no reason to question the veracity of a document from Interpol Guatemala. The Minister simply does not have the resources to obtain the fingerprints of every arrest on the record dating back to 1980 to prove that they actually occurred."

CTR, p.181

In his final reply on 8 December 2006, the Applicant repeated the importance of the alleged criminal record and the significance of the lack of fingerprint evidence to support its voracity.

CTR, p.179

(Applicant's Further Memorandum of Argument,
Sept. 19, 2007, pp.1-7)

[10] Counsel for the Applicant argues that the conclusion should be drawn that the RPD undertook to determine whether fingerprint evidence confirming the existence of a criminal record in Guatemala does exist, and its failure to reach a conclusion on this issue constitutes a breach of a duty of fairness. While Counsel for the Applicant did refer throughout to the lack of confirming fingerprint evidence, at no time was the RPD tasked with resolving the fingerprint issue. As a result, I find no duty of fairness was breached.

[11] However, Counsel for the Applicant also advances a strong argument that the RPD's decision is rendered in reviewable error because of a fundamental erroneous finding of fact. This argument is based on this finding:

The panel has taken in consideration counsel's written submissions in respect to the evidence quoted above of the Minister. I find that the Minister has responded to counsel's concerns of the claimant's criminal record, including the charge of violence, aggression, when the claimant would have been eight years old and, further, that even though the Minister did not respond to the initial request to have copies of the claimant's fingerprints from Guatemala submitted I note that in a letter from Becky Chan, Hearings Officer, dated 31st of July 2006 she wrote:

I have just received police incident reports and fingerprints from Guatemala and Panama regarding the principal claimant. I received these documents on July 26 2006 by mail from Interpol – I submit that these documents are relevant to the determination of the issue of Article 1F(b), exclusion in this refugee claim. The police reports and fingerprints will likely provide further information regarding the veracity of the criminal charges against the principal claimant.

(Emphasis added)

(Decision, pp.11-12)

I agree with Counsel for the Applicant that it is obvious that, perhaps given the confusion exposed in the November 1, 2006 quote from the Certified Tribunal Record, in failing to apply the Minister's retraction of August 21st, this finding of fact is patently unreasonable. The question is: What is the effect of the erroneous finding on the decision rendered?

[12] I agree with Counsel for the Minister that the answer to the question relates to a finding of whether the error is central to the decision rendered. Counsel for the Minister argues that the issue before the RPD was whether there are "serious reasons for considering that the Applicant has committed a serious non-political crime outside of Canada" and that the issue of the criminal record, and the error that relates to it, is not central but peripheral: that is, there is ample evidence to support the finding regardless of a proper resolution to the criminal record issue. With respect, I cannot agree with this submission.

[13] In the present case the Applicant alleges that the Guatemalan police have trumped up a charge of murder against him, and, therefore, by the decision in *Qazi*, the RPD is obliged to make a determination on the Applicant's credibility. In my opinion, the RPD's confused decision-making on this issue should be interpreted as follows: the finding of the existence of fingerprints in Guatemala confirms the existence of a criminal record in Guatemala as alleged by the Minister; the existence of the criminal record is central to the finding of negative credibility against the Applicant; and, in turn, the negative credibility finding has the effect of negating the Applicant's evidence that he has never been arrested in Guatemala..

[14] The result of the RPD's decision-making is that, because of a patently unreasonable factual finding, the Applicant is deprived of his ability to establish that the charges in Guatemala are brought against him with ill motive on the part of the Guatemalan police. In my opinion, since the error has the effect of wrongly depriving the Applicant of a possible defence to the Article 1F(b) intervention by the Minister, it is certainly central to the disposition of the intervention.

[15] As a result, I find the decision under review was made in reviewable error.

ORDER

Accordingly, I set aside the RPD's decision, and refer the matter back to a differently constituted panel for redetermination.

It is agreed that there is no question to certify.

"Douglas R. Campbell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-499-07

STYLE OF CAUSE: BYRON ESTUARDO AMEZQUITA GALINDO
v. MCI

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: December 3, 2007

**REASONS FOR ORDER
AND ORDER:** CAMPBELL J.

DATED: December 6, 2007

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