Date: 20071221

Docket: IMM-932-07

Citation: 2007 FC 1365

Ottawa, Ontario, the 21st day of December 2007

PRESENT: THE HONOURABLE MR. JUSTICE LEMIEUX

BETWEEN:

JOSE JORGE GARDUNO ROJAS
SONIA MILLAN MORALES
JORGE ARMANDO GARDUNO MILLAN
TANYA WENDOLYNE GARDUNO MILLAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] By this application for judicial review, the Rojas family, a father, a mother and two children, all citizens of Mexico, are asking this Court to set aside the decision of a member of the Refugee Protection Division (the panel) dated February 1, 2007, that the applicants were neither Convention refugees nor persons in need of protection.

[2] The panel found that the principal claimant, Mr. Rojas, was not credible. It did not believe his story. The other members of the family are basing their application on the same facts as those alleged in his account.

[3] Mr. Rojas says that he fears three individuals: Messrs. Oseguera and Velasquez, with whom he was associated as a shareholder and director (the associates) in the company Multiparte Sirius S.A. (Sirius), newly founded in October 2001, as well as Enrique Penanieto, elected governor of the State of Mexico. Mr. Penanieto allegedly received funds for his election campaign from Sirius without the approval of the other two shareholders, namely, Mr. Rojas and Ms. Barron, the wife of Guillermo Blancas Sanchez, whom the principal claimant had allegedly known as a customer of the business he managed before Sirius was founded. At Sirius, he held the position of sales director.

[4] The principal claimant's account may be summarized as follows. As indicated above, Mr. Rojas's associates in Sirius allegedly wanted to contribute to the election campaign of Mr. Penanieto, a friend of Mr. Oseguera, who allegedly facilitated the founding of the company, but they were met with a refusal by Mr. Rojas and Ms. Barron. Despite this refusal, in February 2003 the associates allegedly began diverting funds from Sirius to support Mr. Penanieto's election campaign. Mr. Rojas testified that Sirius had an auspicious start:

- 2001: sales of C$2,000,000;
- 2002: sales of C$2,500,000; and
- 2003: higher sales; did not remember.

[5] Mr. Rojas alleges that relations between Sirius shareholders had become intolerable: they agreed to dissolve Sirius and to divide the remaining profits in proportion to their shares.

[6] For this purpose, an audit was carried out by accountants from outside the company at the request of Mr. Rojas and Ms. Barron, the result to be submitted on October 25, 2004. Shortly before October 25, 2004, the associates allegedly approached the applicant to buy his silence and to manipulate the results of the audit in their favour, but Mr. Rojas said he refused. He allegedly also uncovered other irregularities. The fraud committed against Sirius was C$1,000,000.

[7] On October 27 and 28, 2004, Mr. Rojas, Mr. Guillermo and his wife, accompanied by a recently consulted lawyer, reported the associates to the police. Mr. Penanieto was not included in this accusation, apparently for lack of evidence.

[8] On October 29, 2004, the principal claimant said he was intercepted by an acquaintance of the associates and alleged police officers: he was robbed, assaulted and threatened.

[9] The family left their residence in Mexico City to go and live in hiding in the adjoining state, but were located by two of the persons who had beaten him. This forced the family to move to the village of Rustica. For a short period the family allegedly lived in a hotel near the Mexico City airport. Mr. Rojas said he tried to obtain help from the Human Rights Commission, which, following an investigation, notified him that it could do nothing because his complaint with the police could not be found.

[10] On September 6, 2005, the family left Mexico for Canada and claimed refugee protection the same day.

Panel's decision

[11] As indicated above, the panel concluded that Mr. Rojas lacked credibility for several reasons, which I set out below.

- Lack of important documents:

  Only a copy and not the original of the company charter was entered into evidence; there was no copy of the company's annual reports or any copy of his company's statements of account; and there was no copy of the major audit delivered on October 24, 2004. Mr. Rojas did not try to obtain copies of this documentation from the accountant's office. The panel rejected the explanation given by Mr. Rojas: the originals of these documents were with Mr. Guillermo, who had them with him for the complaint of October 27/28, 2004, and allegedly kept them, but unfortunately Mr. Guillermo had disappeared as of November 12, 2004; so had Ms. Barron and all her family afterwards. Mr. Rojas explained that there was no use asking for a copy from the accountant because he had kept no documents, having given them all to Guillermo on the grounds that the accountant did not want to have any problems. He said he had no copy of the Sirius annual reports because at that time he [TRANSLATION] "never thought it would be necessary".

- Several contradictions:

    (a) Inconsistencies between his Personal Information Form (PIF) and port of entry report (PER). Mr. Rojas stated in his PIF that he feared three persons, but the PER indicated only the associates, not Mr. Penanieto (panel's record, p. 143). The panel rejected his explanation that this discrepancy in the PER was the fault of the immigration officer or an interpretation problem. The panel considered that there was no question here of a problem of comprehension, but rather an omission which directly affected the applicant's credibility.

    (b) Contradiction between his testimony and the documentary evidence, namely, whether in his complaint of October 27/28, 2004, he had mentioned the fraudulent sale of the company by his associates. He testified that he had not, which is completely inaccurate because Exhibit P-7, a copy of the complaint, indicated that he had complained to the police that Sirius had been sold by the associates without the knowledge of the other shareholders. The panel rejected his explanation that perhaps he had been mistaken, perhaps he had not fully understood the question or perhaps he thought that the panel had asked questions regarding the chartered accountant.

- Problem concerning the authenticity of the medical certificate filed by Mr. Rojas to corroborate the attack he suffered on October 29, 2004: one box on top of the other,

letters overlapping one another, some words erased and written over. The applicant's explanation was that [TRANSLATION] "that's a stamp on top of another, by mistake".

- Inconsistency regarding the sale of the company. The applicant alleged that his associates had sold the company to a third person (Ms. Ofelia) without authorization. As indicated above, the panel found a contradiction on this point in his testimony. The panel found it unlikely he did not know when this sale took place. Further, the panel was surprised that he had not brought a civil action against his former associates, in view of the company's value.

- Exaggerations in Mr. Rojas's testimony regarding the threat. In its decision, the panel listed the following:

    (a) In reply to a question from the panel as to what interest his two associates would have in sending people to cause him problems, since they had what they wanted, namely, for Sirius's money to be used to help Mr. Penanieto win his election, he answered [TRANSLATION] "it was to eliminate all the clues…evidence that could cause them problems with the IFE committee". IFE is the committee responsible for ensuring that elections are held properly. The panel wrote the following:

> The claimant has never been notified to appear for an IFE hearing. When the panel asked what he could have proved had he been asked

> to appear at such a hearing, he answered, [Translation] "I could have proved that the company's money was being misappropriated for votes for Enrique." When the panel asked why he did not go to the IFE himself, he said, [Translation] "But Guillermo had all of the evidence." When the panel pointed out to him that he could have given oral testimony, he said, [Translation] "But at that time, I was under a lot of pressure from those people and I did not want to put my family and my children at risk."

The panel concluded that the applicant had done nothing with the IFE that would have caused problems for Mr. Penanieto.

(b) Mr. Rojas testified he had always been afraid of Mr. Penanieto and said that he could kill him and his family. The panel noted that Mr. Penanieto was not included in his complaint and once again asked what danger he represented. Mr. Rojas replied, [TRANSLATION] "He believes that I have enough evidence to incriminate him". The panel wrote the following: "However, the claimant told the panel that he could not file a complaint against him at the police station. He was supposedly told at the police station that he did not have enough evidence to accuse Enrique and his party." Since the latter's name does not appear anywhere in the copies of the complaints submitted as Exhibits P-7 and P-8, the panel concluded as follows: "Again, no action was taken against Mr. Penanieto."

(c) In connection with a reply by Mr. Rojas that his persecutors thought he had [TRANSLATION] "[t]he power to bring to light, to make public,

the fact that they had committed fraud and that their campaign was illegal", but in fact he had not made the matter public, Mr. Rojas testified that his purpose was to collect as much evidence as possible and conclude an alliance with the PRD and be able to combat the PRI, Mr. Penanieto's party. Mr. Rojas also testified that a meeting had been scheduled between himself and Ms. Ofelia with the PRD people, but she did not attend the meeting as she disappeared the same day. It would appear she was in possession of a bank receipt establishing a deposit of money from Sirius in one of the accounts of Mr. Penanieto's political campaign. To a question for the panel, Mr. Rojas admitted that he did not subsequently go to the PRD party: [TRANSLATION] "They would not see me because the meeting was in Ofelia's name". He did not arrange another meeting because he did not have sufficient evidence and at this time he was under great pressure [TRANSLATION] "because I was being followed in those days. I did not want to expose myself to any risk". The panel concluded the following:

> Again, the claimant took no action against this Mr. Penanieto, even though he had the opportunity. Nor was any action taken against his two former associates. Also, the claimant was asked whether his testimony could have had an impact on Penanieto's government, since he did not have any written proof against him. He said, [Translation] "No, our plan was to collect as much evidence as possible and establish an alliance with the PRD, and then we would fight the other party (i.e. the PRI)." The claimant himself made that admission at the hearing. At some point during the hearing, the claimant even told the panel that those people would possibly come to persecute him in Canada. Seeing the panel's surprise, he said, [Translation] "Not the governor himself, but he could send someone."

(d) Among his many excuses for not having contacted the lawyer who was with them when his complaint was filed, Mr. Rojas included his fear that his persecutors would have contacted him, which would put him at risk if he spoke to him.

- Inconsistency between actions taken by applicant with counsel. The panel found Mr. Rojas not credible due to the fact that when he was in Mexico he had not contacted the lawyer who went with him to the police station. He testified that it was not he who had hired the lawyer, it was Ms. Barron who had his contact information, his address, and his telephone number. In reply to a question by the panel as to whether he had tried to find him himself, he answered that he had tried to locate him through the Internet in Canada without success, but had made no attempts when he was in Mexico, adding the following: [TRANSLATION] “No, after the kidnapping and threats that I endured, I did not want to stir things up”. The panel was surprised that the second lawyer he retained for his complaint to the Human Rights Commission could not locate the first lawyer, noting that “those two lawyers had supposedly both worked in the State of Mexico”.

[12] The panel raised two other points leading to its finding that Mr. Rojas lacked credibility. He testified that he had feared for his life starting in October 2004, but he did not flee until September 2005. Second, he contacted a second lawyer despite the fact that he had not tried to contact the first lawyer because he [TRANSLATION] “did not want to stir things up”.

Analysis

(a) Standard of review

[13] An RPD finding of a lack of credibility is a question of fact, for which the standard of review is set out in paragraph 18.1(4)(*d*) of the *Federal Courts Act*, which provides that this Court may set aside a decision of a federal board, commission or other tribunal if it has "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it", which is the equivalent of a patently unreasonable decision.

(b) Principles

[14] On the plausibility of testimony, Mr. Justice Décary wrote in *Aguebor v. Minister of Employment and Immigration* (1993), 160 N.R. 315 (F.C.A.), at paragraph 4:

> [4] 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. [Emphasis added.]

[15] This is in fact the conclusion arrived at by the Supreme Court of Canada in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, ruling on a decision by the Appeal Division of the Immigration and Refugee Board, at paragraph 38:

> [38] On questions of fact, the reviewing court can intervene only if it considers that the IAD "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it" (*Federal Court Act*, s. 18.1(4)(*d*)). The IAD is entitled to base its decision on evidence adduced in the proceedings which it considers credible and trustworthy in the circumstances: s. 69.4(3) of the *Immigration Act*. Its findings are entitled to great deference by the reviewing court. Indeed, the FCA itself has held that the standard of review as regards issues of credibility and relevance of evidence is patent unreasonableness: *Aguebor v. Minister of Employment & Immigration* (1993), 160 N.R. 315, at para. 4. [Emphasis added.]

[16] In *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793, Madam Justice L'Heureux-Dubé wrote the following at paragraph 85:

> [85] We must remember that the standard of review on the factual findings of an administrative tribunal is an extremely deferent one: *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, *per* La Forest J., at pp. 849 and 852. Courts must not revisit the facts or weigh the evidence. Only where the evidence viewed reasonably is incapable of supporting the tribunal's findings will a fact finding be patently unreasonable. An example is the allegation in this case, viz. that there is no evidence at all for a significant element of the tribunal's decision: see *Toronto Board of Education, supra*, at para. 48, *per* Cory J.; *Lester, supra*, at p. 669, *per* McLachlin J. Such a determination may well be made without an in-depth examination of the record: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, *per* Gonthier J., at p. 1370. [Emphasis added.]

(c) Findings

[17] Counsel for the applicants argues that the panel erred in assessing Mr. Rojas's credibility as follows:

(1) It drew unfavourable inferences based on pure speculation;

(2) Its decision was turned on implausibility, based on extrinsic criteria;

(3) It may make adverse findings about the implausibility of testimony, but such findings should be made only in the clearest of cases, which is not the case here (see *Valtchev v. Minister of Citizenship and Immigration*, 2001 FCTD 776; *Ye v. Minister of Employment and Immigration*, Federal Court of Appeal, A-711-90);

(4) It arbitrarily rejected the explanations given by the principal claimant: for example, according to counsel, the context is important. Mr. Guillermo held 40% of Sirius, which explained the control he had over the documents;

(5) It rejected outright Exhibits P-6 to P-11, which corroborated and supported the applicant's claims; and

(6) All the exaggerations noted by the panel were based on conjectures or hypotheses and were not reasonable in the circumstances and in the context of an election.

[18] I cannot subscribe to the applicants' arguments. I have read the transcripts of the hearing of August 23, 2006, several times. I feel that the evidence which the panel carefully considered supports each of the findings made. I do not consider that the implausibilities or the inferences by

the panel are so unreasonable as to require the Court's intervention. I cannot conclude that the panel capriciously rejected the explanations given by Mr. Rojas.

[19] In short, in assessing credibility the panel was entitled to rely on criteria such as reason and common sense (*Shahamati v. Minister of Employment and Immigration*, [1994] F.C.J. No. 415 (C.A.)).

[20] When I examined and considered each of the arguments of counsel for the applicants, I felt that she was asking me to reassess the evidence before the panel, which I am not entitled to do.

[21] For these reasons, this application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed. No question of importance was proposed.

“François Lemieux”

Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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