Date: 20080404

Docket: IMM-6519-06

Citation: 2008 FC 447

Ottawa, Ontario, April 4, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

DENNIS MALVEDA
(a.k.a. Dennis M. Malveda)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [Act], for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board) dated November 16, 2006, (Decision) wherein the Board determined that the Applicant was not a Convention refugee under section 96 of the Act or a person in need of protection under section 97 of the Act.

BACKGROUND

[2] The Applicant is a 35-year-old citizen of the Philippines from Batangas. His claim for refugee protection is based upon his fear of persecution by the New People's Army (NPA), a communist rebel group in the Philippines.

[3] From 1998 to 2005, the Applicant says he was a strong supporter of a former local Mayor and later Governor of Batangas. He worked for the Governor during election campaigns in 2001 and 2003. He also worked full-time in a non-political capacity for a company owned by the Governor.

[4] In 2005, the Applicant claims that the NPA began to menace him by roaming around his house and sending threatening letters. He reported the roaming incidents to the local police and they told him to be careful. The Applicant did not report the first two of three threatening letters.

[5] The Applicant went to the Governor for help and alleges that the Governor told him to leave the country and offered no viable advice about how to protect himself in the Philippines.

[6] The Applicant arrived in Canada on December 14, 2005.

[7] In 2005, after the Applicant left the Philippines, his wife received another threatening letter addressed to him, which she took to the police. The police informed her that there was nothing they could do because the Applicant had left the country.

[8] The Applicant claimed refugee status in Canada on February 3, 2006.

THE BOARD'S DECISION

[9] In its Decision dated November 16, 2006, the Board found the Applicant to be neither a refugee nor a person in need of protection.

[10] The determinative issue in the claim was whether the Applicant had a well-founded fear of persecution in the Philippines by reason of a Convention ground, including whether he had rebutted the presumption of state protection.

[11] The Board accepted that the Applicant worked for the Mayor of Batangas, who later became the Governor, as a part-time advisor, and that he worked on campaigns during election periods. Further, it accepted that the Applicant worked for one of the Governor's private companies as a Marketing Supervisor. But it found that the Applicant did not hold a high political position even though he was a strong supporter of the Governor during election times.

[12] The Board also believed that the Applicant had found notes on his property purportedly from members of the NPA. However, the Board did not find it credible that the Applicant did not go to the authorities with the first two threatening letters when he resided in the Philippines but that his wife went with the third letter after he had left the country.

[13] The Board did not find it plausible that the Applicant went to the Governor and advised him of the threatening letters from the NPA but that the Governor only told him to "cool it" and leave the country, and did not offer any real advice or assistance in terms of protection.

[14] Thus, it was determined that the Applicant did not make any diligent or bona fide attempts to seek protection in his country of origin before travelling abroad for asylum.

[15] The Board indicated that the Philippines is a functioning democracy, and therefore the presumption of state protection was applicable. The Applicant had not approached the authorities and he had not rebutted the presumption of state protection. The Board also recognized that the NPA was still "a force" in the Philippines, but found that adequate state protection would be available to the Applicant.

ISSUES

[16] The Applicant raises the following issues:

(1) Did the Board err in its credibility and implausibility findings?

(2) **Did the Board err in giving more probative weight to the documentary evidence?**

(3) **Did the Board err in its analysis by providing inadequate reasons and ignoring relevant evidence?**

REASONS

Standard of Review

[17] Recently, the Supreme Court of Canada has reconsidered the standard of review analysis applicable to administrative decisions and posited two standards: reasonableness and correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*]). The Supreme Court also provided guidance in determining the appropriate standard of review in a given case:

> FC/CF[…] questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness (*Dunsmuir* at para. 51).

Further, the Supreme Court emphasized that the standard of review analysis is composed of two steps:

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review (*Dunsmuir* at para. 62).

[18] In the present case, the Applicant attacks the Board's implausibility and credibility findings. These findings are highly factual in nature. In numerous pre-*Dunsmuir* decisions, this Court has held that the appropriate standard of review was patent unreasonableness (*Soosaipillai v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1040 at para. 9; *Xu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1701, [2005] F.C.J. No. 2127 (QL) at para. 5; *Asashi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 102, [2005] F.C.J. No. 129 (QL) at para. 6; *Canada (Minister of Citizenship and Immigration) v. Elbarnes*, 2005 FC 70, [2005] F.C.J. No. 98 (QL) at para. 19; *Aguebor v. Canada (Minister of Employment and Immigration)*, (1993) 160 N.R. 315 (QL) at 316-317).

[19] The issue of whether or not the Board ignored relevant evidence is also a factual inquiry and has been reviewed in the past on a standard of patent unreasonableness (see *Dannett v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1363, [2006] F.C.J. No. 1701 (QL) at para. 33).

[20] In light of the decision in *Dunsmuir*, and the previous jurisprudence of this Court, I find the standard of review applicable to these factual questions to be reasonableness. However, when reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47). I would add that regardless of the standard of review analysis applied in the present case, either pre-*Dunsmuir* patent unreasonableness, or post-*Dunsmuir* reasonableness, my conclusions would be the same.

[21] Where the adequacy of the Board's reasons is called into question, the issue raised is one of procedural fairness (*Thomas v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 838, [2007] F.C.J. No. 1114 (QL) at para. 14; *Adu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 565, [2005] F.C.J. No. 693 (QL) at para. 9). Pursuant to *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, [2003] S.C.J. No. 28 (QL) at para. 100, "it is for the courts, not the Minister, to provide the legal answer to procedural fairness questions."

(1) <u>Did the Board err in its credibility and implausibility findings?</u>

[22] It is trite law that credibility findings are the heartland of the Board's jurisdiction (*R.K.L. v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, [2003] F.C.J. No. 162 (QL) at para. 7). Thus, the Board may impugn the credibility of claimants based upon implausibility findings as long as its reasons are stated in "clear and unmistakable terms" (*Khrystych v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 498, [2005] F.C.J. No. 624 (QL) at para. 4; *R.K.L.*, *supra*, at para. 9).

[23] Plausibility findings that are couched in "vague and general terms" will render defective the Board's credibility assessment (*Hilo v. Canada (Minister of Citizenship and Immigration)*, [1991] F.C.J. No. 228 (F.C.A.) (QL)). Thus, "the Board must explain its findings and not merely state that it finds some particular event or action implausible" (*Tuggrh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 927, [2005] F.C.J. No. 1158 (QL) at para. 5).

[24] The explanation must be based on rationality and common sense and must be consistent with the documentary evidence (*R.K.L., supra*, at paras. 10 and 14). As Justice Muldoon asserted in *Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, [2001] F.C.J. No. 1131 (QL) at para. 7:

> […] 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.

[25] In cases where the Board bases its credibility findings on "perceived implausibilities in claimants' stories rather than on internal inconsistencies and contradictions in their narratives or their demeanour while testifying" the duty to fully articulate its reasoning is of particular importance (*Leung v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 774 (QL) at para. 15). This requires "a clear rationalization process supporting the Board's inferences" and reference to "relevant evidence which could potentially refute such conclusions" (*Santos v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 937, [2004] F.C.J. No. 1149 (QL) at para. 15).

[26] The aforementioned requirement to provide detailed reasons when making implausibility findings stems from the principle articulated in *Valtchev*, *supra*, at para. 6, and *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.) at 305, that a refugee claimant's allegations are presumed to be true unless there are reasons to doubt that truthfulness. Thus, there must be cogent reasons not to believe a claimant (*Vodics v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 783, [2005] F.C.J. No. 1000 (QL) at para. 11).

[27] In the present case, the Board found that the Applicant "did not make any diligent or bona fide attempt to seek protection in his country of origin regarding the alleged threatening letters from the NPA before travelling abroad for asylum" and that the Applicant "failed to rebut" the presumption of state protection.

[28] The credibility concerns arose over the reasons given by the Applicant as to why he had not taken the first two threatening letters to the police and sought their protection. The Applicant's explanation was that he feared that, if he did so, the NPA would be more angry with him. But the Applicant had earlier gone to the authorities when he saw individuals roaming around his house, and his wife had taken the third threatening note to the police after the Applicant had left the country.

[29] So the reasons given by the Board for doubting that the Applicant feared to make the NPA more angry were that he had gone to the police before, and his wife went to the police after he left. The Board accepted that the Applicant had received the threatening letters.

[30] As reasons for doubting the Applicant's credibility on this point, the Board's position is unreasonable to me. I just don't see how the Applicant's wife's approaching the police with the third note after he left the country suggests in any way that the Applicant did not fear making the NPA angry while he was in the country. And I do not see how the Applicant's approaching the police earlier meant that he did not fear the NPA once the threats to his life were crystallized by the threatening notes and the Applicant realized what he was actually facing.

[31] The Board was certainly right to be concerned with the issue of why the Applicant did not go to the police, but the reasons it gives for rejecting his answer are not adequate and, in my view, are unreasonable.

[32] The Board's finding on implausibility is equally perplexing to me:

> The panel does not find it plausible that the claimant went to the Governor and advised him of the threatening letters from the NPA and that the Governor only told him to cool it and leave the country but did not offer any concrete advice or tell the claimant who to contact in terms of protection.

[33] Bearing in mind that an attempt was later made on the Governor's own life and that some of his personnel were killed in the attack, I see nothing inherently implausible about advice to the Applicant to get out of the country. The Governor's response is equally compatible with a conclusion that there was nothing that could be done to protect the Applicant, so he had better leave. The Board is simply speculating here, without any real evidentiary base.

[34] So it may be that the Applicant had no acceptable reason for not going to the police with the letters and for leaving the country without asking for protection, but in my view the Board presents no acceptable reasons for rejecting his explanations. I have to conclude that this part of the Decision is unreasonable.

(2) Did the Board err by giving greater probative value to the documentary evidence?

[35] The Applicant submits that the Board committed a reviewable error when it assigned greater probative value to the documentary evidence than to the Applicant's testimony, citing specifically the following passage from the Board's Decision:

> The panel assigns far greater probative value to the documentary evidence than to the testimony of the claimant with regard to the availability of state protection in the Philippines. In this regard, the panel takes guidance from the case law in *Edomsky*, which stands for the proposition that the board can prefer objective documentary evidence to the subjective testimony of the claimants. The documentary evidence cited herein is drawn from a variety of reliable and independent sources, none of whom can have any vested interest in whether or not the claimants are determined to be Convention refugees. To that extent they are free of bias.

[36] I note that it is indeed open to the Board to prefer documentary evidence to a claimant's testimony (*Edomsky v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1311 (QL) at para. 10; *Zhou v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1087 (F.C.A.) (QL) at para. 1); however, a cautious approach is warranted when so doing.

[37] As this Court has indicated in several decisions, blanket statements that documentary evidence is to be preferred to the claimant's oral testimony as being more objective and disinterested in the outcome of the hearing are problematic. Indeed, such statements are

> […] tantamount to stating that documentary evidence should always be preferred to that of a refugee claimant's because the latter is interested in the outcome of the hearing. If permitted such reasoning would always defeat a claimant's evidence." (*Coitinho v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1037, [2004] F.C.J. No. 1269 (QL) at para.7).

Were the principle behind such blanket statements correct, the evidentiary burden imposed upon claimants would be raised to a near insurmountable level.

[38] Further, such unqualified statements appear to negate, if not reverse, the presumption of truthfulness of a claimant's testimony established in *Maldonado, supra* (see *Kosta v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 994, [2005] F.C.J. No. 1233 (QL) at paras. 28-35). In the absence of additional grounds, preferring documentary evidence to that of the claimant based solely on the fact that it emanates *from the claimant* constitutes a reviewable error. Thus, the Board must indicate why there is a "reason to doubt" the claimant's testimony and prefer the documentary evidence.

[39] In the Decision in this case, there is no attempt to raise and discuss what the Applicant actually said on this issue, or to identify those aspects of the documentary evidence that should be preferred, and why they are to be preferred, and there is no attempt to deal with aspects of the documentary evidence that might support the Applicant's position. All we have is a blanket dismissal that explains nothing. In my view, this is not adequate in the circumstances and this aspect of its Decision contains a reviewable error.

(3) Did the Board err by ignoring relevant documentary evidence and failing to provide adequate reasons?

[40] The Applicant contends that the Board failed to provide adequate reasons and ignored relevant documentary evidence in its analysis of the availability and effectiveness of state protection. Thus, the relevant issue is whether, in making its state protection determination, the Board

> […] set out its findings of fact and the principle evidence on which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors. (*Via Rail Canada Inc. v. National Transportation Agency (C.A.)*, [2001] 2 F.C. 25, [2000] F.C.J. No. 1685 (QL) at para. 22.)

As with all administrative tribunals, the Board is under an obligation to provide reasons that are adequate in the circumstances.

[41] However, when assessing the adequacy of reasons, those reasons "must not be held to a standard of perfection or read microscopically" (*Thomas* at para. 35; *Andryanov v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 186, [2007] F.C.J. No. 272 (QL) at para. 21; *Liang v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1501, [2003] F.C.J. No. 1904 (QL) at para. 42). As the Federal Court of Appeal asserted in *Ragupathy v. Canada (Minister of Citizenship and Immigration*, 2006 FCA 151, [2006] F.C.J. No. 654 (F.C.A.) (QL) at para. 15:

> […] a reviewing court should be realistic in determining if a tribunal's reasons meet the legal standard of adequacy. Reasons should be read in their entirety, not parsed closely, clause-by-clause, for possible errors or omissions; they should be read with a view to understanding, not puzzling over every possible inconsistency, ambiguity or infelicity of expression.

Thus, in assessing the adequacy of the reasons provided, a reviewing Court must look to the overall reasoning process contained in a decision.

[42] A related consideration is whether or not relevant evidence was ignored in the Board's assessment. Indeed, while the failure to analyse relevant evidence suggests an erroneous finding of fact, it also impugns the adequacy of the reasons provided.

[43] There is a presumption that the Board considered all documentary evidence that was before it (*Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.) (QL) at para. 1). Thus, the fact that the Board has not mentioned some of the documentary evidence is not fatal to the Decision (*Hassan v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 946 (F.C.A.) (QL)).

[44] However, as Justice Evans stated in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (QL) at para. 15, an erroneous finding of fact can be inferred from a failure of an administrative board to "mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency."

[45] Similarly, as I stated in *Simpson v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 970, [2006] F.C.J. No. 1224 (QL) at para. 44:

> While it is true that there is a presumption that the Board considered all the evidence, and there is no need to mention all the documentary evidence that

> was before it, where there is important material evidence on the record that contradicts the factual finding of the Board, [it] must provide reasons why the contradictory evidence was not considered relevant or trustworthy […]

[46] Specifically, in the context of state protection, I find the words of Justice Layden-Stevenson to be particularly helpful on the facts before me in this case:

> The question of effective state protection was identified as the central issue. Where evidence that relates to a central issue is submitted, the burden of explanation increases for the board when it assigns little or no weight to that evidence or when it prefers specific documentary evidence over other documentary evidence. Here, there is virtually no indication that the RPD considered the Applicants' documentary evidence or the submissions of their counsel in relation to the issue of state protection. The Applicants were entitled to know that the board had not ignored these matters. A general statement that all of the evidence was considered, in the circumstances, does not suffice. (*Castillo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 56, [2004] F.C.J. No. 43 (QL) at para. 9)

Thus, the burden of explanation increases with the relevance of the evidence to the central issues before the Board.

[47] In the present case, the Board cited one piece of documentary evidence: the U.S. Department of State Country Report on Human Rights Practices, March 8, 2006. Thus, it would appear that the Board relied upon the US Department of State report as at least one element supporting its conclusions. However, I see no indication of how or why that report supports the Board's findings. Aside from stating that the Philippines is a democratic republic and that the government generally respects the human rights of its citizens, the majority of the report goes on to discuss the strength of the NPA and the weaknesses of the state in providing protection.

[48] While it may have been open to the Board to arrive at its conclusion based on the documentary evidence, some kind of meaningful analysis is necessary for the reasons to be considered adequate. It is clear that in cases of state protection, the claimant bears a burden of proof directly proportional to the level of democracy in the state in question (*Kadenko v. Canada (Minister of Citizenship and Immigration)*, [1996] 143 D.L.R. (4th) 532, [1996] F.C.J. No. 1376 (F.C.A.) at page 534; *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, [2007] F.C.J. No. 584 (F.C.A.) (QL) at para. 57). However, this does not relieve the Board of its obligation to provide clear and adequate reasons indicating why that burden was not met. In the present case, the Board failed in this regard.

[49] For the reasons given, I find that the Board made reviewable errors on all three points raised by the Applicant and this matter must be returned for reconsideration.

[50] Counsel are requested to serve and file any submissions with respect to certification of a question of general importance within seven days of receipt of these Reasons for Judgment. Each party will have a further period of three days to serve and file any reply to the submission of the opposite party Following that, a Judgment will be issued.

"James Russell"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	IMM-6519-06
STYLE OF CAUSE:	DENNIS MALVEDA a.k.a. Dennis M. Malveda v. THE MINISTER OF CITIZENSHIP AND MMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	December 4, 2007
REASONS FOR JUDGMENT:	RUSSELL J.
DATED:	April 4, 2008

WRITTEN REPRESENTATIONS BY:

Ms. Vaska Bozinovski	FOR THE APPLICANT
Ms. Jennifer Dagsvik	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Vaska Bozinovski Barrister & Solicitor 4665 Younge Street Suite 304 Toronto, Ontario	FOR THE APPLICANT
JOHN H. SIMS, Q.C. DEPUTY ATTORNEY GENERAL OF CANADA	FOR THE RESPONDENT