Federal Court  Cour fédérale

Date: 20090708

Docket: IMM-5669-08

Citation: 2009 FC 707

Ottawa, Ontario, July 8, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

MONTESINOS HIDALGO, Marco Antonio

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated December 1, 2008, where the Board found that the Applicant was not a Convention refugee or a person in need of protection.

Issues

[2] This application raises the following issues:

a) Did the Board err in its analysis of state protection?

b) Did the Board err by relying on the Board's persuasive decision TA6-07453 in its analysis of state protection?

c) Was there a breach of procedural fairness that necessitates the matter be sent back to the Board?

Factual Background

[3] The Applicant is a citizen of Mexico and was born in Tapachula on December 2, 1978. After completing secondary school in 1998, he obtained a law degree and worked in a legal capacity for the Instituto Federal Electoral.

[4] In 2004, the Applicant opened his own video store (DVD Magic) in Tapachula.

[5] In December 2006, three individuals who were regular customers entered the store. They offered to complete certain renovations if the Applicant agreed to sell something in the store in exchange. The following week, they returned with a sample of some white powder. When the Applicant refused to sell the powder, they told him that he did not know what he was getting into.

[6] On January 15, 2007, just as he was closing his store for the night, four people with weapons came in the store and beat the Applicant, telling him that he was creating resistance against the expansion of their territory. The Applicant reported the incident to the police who agreed to investigate.

[7] At the end of March 2007, while he was on his way home, the Applicant was confronted by a policeman named Pedro Sanchez and one of the men who had come to his store in January. The officer led the Applicant to believe that if he did not cooperate with the persons who were trying to sell the white powder, he would be sorry and he could lose his store.

[8] The next day, when he went to inquire about the status of the investigation at the police station, the Applicant came across the same police officer with whom he had met the previous day. Officer Sanchez told him that because it was not an emergency case and because the police lacked proper resources, they could do nothing for him. The following day, two persons entered the Applicant's store to assault him for going to the police and they threatened to kill him the next time. The Applicant went to a local clinic for treatment for his injuries and while he was at home recovering, his store burned in a fire.

[9] The Applicant then moved to Tuxtla Gutierrez, Chiapas, where his mother and one of his brothers lived and worked. In March 2007, the Applicant went to the police in Tuxtla to tell them about Officer Sanchez and what had happened to him. The police told him that they would investigate his allegations and that they would also question Officer Sanchez.

[10] In September 2007, the Applicant received a call on his cellular telephone. The caller told him that it had been discovered that he had filed a complaint with the police and that an

investigation was underway from the central office. The caller threatened the Applicant with death if he identified anyone in the investigation.

[11] The Applicant decided to leave Mexico to attend a conference in Gatineau, Quebec, which had been arranged for him by his brother. The Applicant left for Canada on November 7, 2007 and when the conference ended, he did not return to Mexico. He was advised to make a refugee claim, which he did on December 19, 2007.

[12] The Applicant alleges that he is afraid of being killed because there is inadequate state protection in Mexico against corrupt policemen who work with gang members.

Impugned Decision

[13] The Applicant's claim was refused by the Board on the basis that there was adequate state protection available to the Applicant and because he lacked credibility.

[14] The Board found that the Applicant failed to produce any acceptable documents to show that he was the owner of the DVD Magic store in Tapachula. He tried to introduce a registration document which had not been translated. When the interpreter present at the hearing was asked to view the document, she indicated "that there was nothing there to state that [sic] what the registration was except the date of 2000/14/04". Nothing in the document related it to a video store or to an address in Tapachula. As a result, the document was not accepted into evidence and no weight was given to it.

[15] The Applicant's store was in a building rented from Dr. Carlos Carballa. The Applicant admitted he had entered into a written lease agreement with Dr. Carballa, but did not bring a copy of the lease with him at the hearing. The Applicant was unable to produce photographs of his video store or brochures or other documents which would mention the name of the store.

[16] The Applicant was allegedly injured on January 15, 2007, and went to the regional hospital in Tapachula for treatment. He admitted that the hospital registered his visit, but he did not keep the records, which he states are in his abandoned house in Tapachula. The Applicant's Personal Information Form (PIF) was signed on January 15, 2008 and he has obtained a counsel since then. The Applicant or his counsel should have realized the importance of producing available documents of this nature to support the claim.

[17] Following the second attack, the Applicant was injured and treated for severe injuries at the same hospital in March 2007. One of his teeth had to be extracted there and medication was prescribed for him by the doctor. The Applicant did not bring any of these records with him, nor did he attempt to obtain these records, notwithstanding the instructions at question 31 of his PIF to "attach copies of any medical, psychological, police or other documents to support your claim."

[18] At the end of the hearing, the Applicant's counsel asked the Board if he could be allowed sufficient time to obtain these documents from Mexico for the Board before preparing its reasons. The Board denied the request because it considered that the Applicant was obliged to provide

sufficient credible documents to corroborate his claim no later than 20 days before the hearing. There were no exceptional circumstances in the case at bar which warranted a delay in completing the hearing and for the Board to finalize its reasons.

[19] The Applicant told the Tuxtla police about Officer Sanchez when he moved there in March 2007. The police therefore knew the officer's identity at that time and they promised to investigate. In fact, the police would have commenced their investigation at or about the time the Applicant was getting ready to leave Mexico to come to Canada. The Board did not understand why the Applicant received a call in September 2007 from a person who threatened to kill him if he identified or named anyone involved since he had already named and identified one of them as a corrupt police officer in March of the same year.

[20] Other than police officer Sanchez, the Applicant did not know who the other drug dealers were, except that they wore sleeveless t-shirts with tattoos. He did not report the first incident to the police because he thought they looked like police by the way they were dressed and because he was afraid to report them. The Applicant believes that most police officers in Mexico, both state and federal, are corrupt, notwithstanding the fact that this was the very first time he had any personal contact with the police. If the Applicant held the belief that the police were corrupt and would not act in matters like this, the Board wondered why he went to the police on two occasions to report on a corrupt police officer.

[21] The Applicant acknowledged that state protection was one of the determinative issues in this case. He also acknowledged that he was aware of the persuasive decision TA6-07453, dated November 26, 2007, which analyzed the issue of state protection in Mexico, the availability of the mechanisms for lodging complaints, and the level of democracy in Mexico.

[22] The Board reminded that there is a presumption that a state is capable of protecting its citizens and an Applicant may rebut this presumption by providing “clear and convincing” proof of lack of state protection in the country of origin. The Applicant must approach his state for protection provided state protection might be reasonably forthcoming.

[23] When the state in question is a democratic state, such as Mexico, the Applicant must do more than show that he went to see some member of the police force and that his efforts were unsuccessful. The burden of proof resting on the Applicant is, in a way, directly proportional to the level of democracy of the state in question; the more democratic the state’s institutions, the more the Applicant must have done to exhaust all reasonable courses of action open to him.

[24] The police have to be given a reasonable period of time to investigate the facts and to lay charges if their information and facts warrant such action. The Applicant was told by the Tuxtla police that they would investigate and Officer Pedro Sanchez would also be questioned. The Applicant admitted at the hearing that he did not wait around long enough to find out the results of their investigation before he came to the conference in Canada.

[25] The Board thought that had the Applicant remained in Mexico, with the evidence the police had, they might have charged and convicted Officer Sanchez.

[26] The Board assumed that without the Applicant's further cooperation because he was in Canada, he would not be available to testify as a witness against officer Sanchez, the investigation started by the Mexican police would probably end quickly. The Applicant should have waited to see whether or not justice was done in this particular instance before fleeing.

[27] The issue of the availability of state protection was carefully analysed in persuasive decision TA6-07453 and the Board was satisfied that the facts of the case before it were similar enough to the facts in the persuasive decision.

[28] At the hearing, the Applicant's counsel did not attempt to distinguish the facts or findings made by the Board in TA6-07453, nor did he refer to it during his oral submissions, other than to acknowledge its existence.

Relevant Legislation

[29] The relevant legislation can be found at Annex A at the end of this document.

Standard of Review

[30] In light of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, *Cervantes v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 680, [2008] F.C.J. No. 848 (QL) at

para. 7 and *Farias v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1035, 170 A.C.W.S. (3d) 601 at para. 14, the Court finds that the standard of review for the Board's assessments of the adequacy and availability of state protection is reasonableness.

[31] Questions of procedural fairness should be assessed on a correctness standard (*Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221 at para. 65). When a breach of the duty of fairness is found, the decision should generally be set aside (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 at para. 54).

a) Did the Board err in its findings about state protection?

[32] The Board is entitled to significant deference with respect to its findings on whether an Applicant has rebutted the presumption of state protection. In the present case, it was entirely open to the Board under the circumstances to conclude that the Applicant had failed to exhaust all reasonable avenues to seek alternative avenues of redress sanctioned by the state.

[33] The Applicant admitted that he left Mexico for Canada in November 2007, just as the investigation concerning officer Sanchez was about to begin. Thus, the Applicant was wrong to believe that the Mexican authorities were not able to protect him. By fleeing Mexico, the Applicant simply did not give the Mexican authorities the opportunity to offer him adequate protection by prosecuting the offenders. The authorities in Tuxtla stated that they would investigate the Applicant's complaint, but the Applicant did not wait for the results of the investigation before

fleeing Mexico. It was reasonable for the Board to conclude that the Applicant had not shown by clear and convincing evidence that Mexico was unable to protect him.

b) Did the Board err by relying on the Board's persuasive decision TA6-07453 in its analysis of state protection?

[34] The factual context surrounding the persuasive decision TA6-07453 is not exactly the same as in the case at bar but similar enough for the Board to adopt and apply the same findings as to state protection in the case it had to decide. That conclusion is not unreasonable.

[35] The Board was not bound by the persuasive decision. Rather, it considered its relevance as part of its specific assessment of the Applicant's claim with the evidence it had before it.

[36] The Board is assumed to have weighed and considered all the evidence presented to it unless the contrary is shown. The mere fact that the Board's reasons do not canvass every piece of evidence does not indicate that the Board did not consider these documents and is not fatal to its decision (*Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.) (QL); *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 at 318, 36 A.C.W.S. (3d) 635 (F.C.A.)). In the case at bar, the Board's reasons adequately support the decision and the Court's intervention is not warranted.

c) Was there a breach of procedural fairness that necessitates the matter be sent back to the Board?

Applicant's Arguments

[37] While making no specific finding in its reasons that the Applicant lacked credibility, the Board cast aspersions on the Applicant's credibility regarding two matters: the September 2007 threatening phone call and the lack of documentation filed by the Applicant in support of his claim.

[38] The Board made no finding that the Applicant's testimony was inconsistent or that it was contradicted by any other evidence before it. The Board made no comment on any omissions from the Applicant's testimony or PIF, or on the Applicant's testimony, but the decision made several references to the Applicant's failure to provide corroborative evidence in support of his claim. However, the case law states that a Board member errs in making a negative credibility finding against an Applicant based solely on the lack of documentary evidence (*Ahortor v. Canada (Minister of Employment and Immigration)* (1993), 65 F.T.R. 137, 41 A.C.W.S. (3d) 863 (F.C.T.D.) at para. 45).

[39] There was nothing in the case at bar to contradict the Applicant's sworn testimony that he was the proprietor of a video store and that he had attended at a medical clinic following two beatings in January and March 2007. By doubting the Applicant's credibility because of a lack of corroborative documentation, the Applicant submits that the Board member erred in law.

[40] The Applicant also notes that his counsel had not asked him to provide any documentation concerning his claim before the hearing. At the hearing, the Applicant's counsel asked the Board for time to file documentation before the Board finalized its reasons. The Board rejected the request, stating that there were no exceptional circumstances warranting a delay in completing the hearing and for the Board to finalize its reasons. The Applicant submits that given that the decision had not yet been rendered on the date the motion was filed, as a matter of procedural fairness, the Board should have considered the request. By failing to do so, the Board breached its duty of procedural fairness owed to the Applicant.

[41] On November 26, 2008, the Applicant, with new counsel, filed a motion with the Board requesting, among other relief, an extension of time within which to file new documentary evidence. Although the Applicant's motion was filed several days before the Board member rendered his decision, there was no acknowledgement by the Board of receipt of the motion. On December 15, 2008, it was returned to the Applicant's counsel, who was told that the decision had already been made in the Applicant's case.

[42] In his second distinct written application, the Applicant provided new information showing that there were exceptional circumstances in support of the request. In particular, the Applicant explained that his counsel at the hearing had never informed him that he was required to provide documentary evidence in support of his claim, that he only learned of this requirement during the hearing and that this information was readily available to him.

[43] The Respondent argues that this was not an exceptional situation where the evidence was new or previously unavailable. The Applicant is not contending that the Board was required to accept his request for more time to submit documentation. The Applicant alleges that since the motion was received by the Board prior to the date of the decision, and since pursuant to section 69 of the *Refugee Protection Division Rules*, SOR/2002-228, the Board has the power to "change a requirement of a rule", "excuse a person from a requirement of a rule", or "extend or shorten a time limit, before or after the time limit has passed", the motion should have been addressed before the decision was rendered. The failure of the Board to acknowledge the Applicant's motion constitutes a breach of procedural fairness.

Respondent's Arguments

[44] The Applicant did not provide corroborating documentary evidence within the statutorily prescribed time and he now alleges that his attempts to file documents late by way of a motion weeks after the hearing, led to a breach of procedural fairness. However, the record shows that rather than a breach of procedural fairness, the Applicant simply did not bring his motion in time for the Board to consider it before rendering its decision.

[45] At the hearing, the Applicant's counsel requested an extension of time to file documentary evidence, but the Board denied the extension because it held that there were no exceptional circumstances which warranted the delay. The Board held that the Applicant had the obligation to provide any documents to corroborate his claim 20 days before the hearing, as stipulated at Rule 29(4)(a) of the *Refugee Protection Division Rules* and on the Personal Information Form (PIF).

[46] The Board rejected the Applicant's claim on November 4, 2008, the day after the hearing. Draft reasons were provided to the secretary on that date and the reasons were signed on December 1, 2008.

[47] On November 26, 2008, a few weeks after the hearing, a counsel other than the Applicant's counsel of record, sent motion materials for a motion to extend the time for filing evidence by fax to the Board. This counsel was not the Applicant's counsel of record at the time. By the time the Applicant filed a notice of change of counsel on December 9, 2008, the Board's decision had already been rendered.

[48] In his affidavit, the Applicant's new counsel affirmed that he was asked to act on behalf of the Applicant on November 21, 2008. However, the Applicant or his counsel only attempted to change the Applicant's counsel of record only on December 9, 2008, after the decision was signed. The *Refugee Protection Division Rules* require an immediate notification of change of counsel, as is repeated on various forms received by the Applicant. The Applicant and his new counsel should have been aware of the close timing and should have ensured that the motion came from counsel of record so that it could properly be put before the Board. The Board's adherence to its *Rules* is not a breach of fairness, neither is it unduly harsh given that counsel was advised that he could submit a motion to reopen.

[49] Rule 4(4) of the *Refugee Protection Division Rules* provides that a claimant must provide all changes related to his counsel's information in writing to the Division and the Minister. Claimants before the Board are also advised on the PIF to notify the Board immediately if they change counsel. They are provided with a special form in the PIF kit for this purpose. It is important that Applicants provide the Board with updated contact information of their counsel.

[50] On December 11, after the Board had rendered its decision, the Applicant attempted to provide the Board with documentary materials in support of his claim. He was provided with the Board's decision.

[51] On December 15, Board registry staff returned the motion materials to the new counsel and advised him that as the decision had already been rendered, he could file a motion to reopen the case if he chose so. The Applicant did not avail himself of that opportunity and instead pursued this judicial review.

[52] In the absence of exceptional circumstances, this Court should not reward the Applicant or his counsel's lateness by finding a procedural fairness breach. To do so would be unfair to other Applicants who follow the *Refugee Protection Division Rules* and the prescribe time requirements. In fact, the Board had already dealt with the issue of the Applicant's request to file evidence after the hearing. As noted in the Board's reasons, at the end of the hearing, the Applicant's then counsel had requested an extension of time to file documentary evidence before the Board prepared its reasons but the Board denied the request because of an absence of exceptional circumstances

warranting a delay as this was not an exceptional situation where the evidence was new or previously unavailable.

Analysis

[53] The Board did not commit a breach of procedural fairness in determining that there were no exceptional circumstances justifying the grant of an additional delay to file documentary evidence to be considered by it in its reasons. The Applicant's PIF was signed on January 15, 2008; he had since then been represented by an experienced lawyer. The hearing date was November 3, 2008. The Applicant had ample time to gather and file his documents before the Board.

[54] Furthermore, the Applicant could have filed a motion to reopen the case after the decision was signed but he chose instead to pursue his judicial review. In light of these circumstances, there is no justification for this Court to intervene.

[55] The parties did not suggest questions for certification and none arise.

JUDGMENT

THIS COURT ORDERS the application for judicial review be dismissed. No question is certified.

"Michel Beaudry"
Judge

ANNEX A

Relevant Legislation

Refugee Protection Division Rules, SOR/2002-228

4. (1) The claimant must provide the claimant's contact information in writing to the Division and the Minister.

Time limit
(2) The claimant's contact information must be received no later than 10 days after the claimant received the Personal Information Form.

Change to contact information
(3) If the claimant's contact information changes, the claimant must without delay provide the changes in writing to the Division and the Minister.

Claimant's counsel
(4) A claimant who is represented by counsel must, on obtaining counsel, provide the counsel's contact information in writing to the Division and the Minister. If that information changes, the claimant must without delay provide the changes in writing to the Division and the Minister.

29. (1) If a party wants to use a document at a hearing, the party must provide one copy to any other party and two copies to the Division, unless these Rules require a different number of copies.

Disclosure of documents by the Division
(2) If the Division wants to use a document at a hearing, the Division must provide a copy to each party.

Proof that document was provided
(3) Together with the copies provided to the

4. (1) Le demandeur d'asile transmet ses coordonnées par écrit à la Section et au ministre.

Délai
(2) Les coordonnées doivent être reçues par leurs destinataires au plus tard dix jours suivant la réception, par le demandeur d'asile, du formulaire sur les renseignements personnels.

Changement des coordonnées
(3) Dès que ses coordonnées changent, le demandeur d'asile transmet ses nouvelles coordonnées par écrit à la Section et au ministre.

Coordonnées du conseil
(4) Dès qu'il retient les services d'un conseil, le demandeur d'asile transmet les coordonnées de celui-ci par écrit à la Section et au ministre. Dès que ces coordonnées changent, le demandeur d'asile transmet les nouvelles coordonnées par écrit à la Section et au ministre.

29. (1) Pour utiliser un document à l'audience, la partie en transmet une copie à l'autre partie, le cas échéant, et deux copies à la Section, sauf si les présentes règles exigent un nombre différent de copies.

Communication de documents par la Section
(2) Pour utiliser un document à l'audience, la Section en transmet une copie aux parties.

Preuve de transmission
(3) En même temps qu'elle transmet les copies à

Division, the party must provide a written statement of how and when a copy was provided to any other party.

la Section, la partie lui transmet également une déclaration écrite indiquant à quel moment et de quelle façon elle en a transmis une copie à l'autre partie, le cas échéant.

Time limit
(4) Documents provided under this rule must be received by the Division or a party, as the case may be, no later than

Délai
(4) Tout document transmis selon la présente règle doit être reçu par son destinataire au plus tard :

(a) 20 days before the hearing; or

a) soit vingt jours avant l'audience;

(b) five days before the hearing if the document is provided to respond to another document provided by a party or the Division.

b) soit, dans le cas où il s'agit d'un document transmis en réponse à un document reçu de l'autre partie ou de la Section, cinq jours avant l'audience.

69. The Division may

69. La Section peut :

(a) act on its own initiative, without a party having to make an application or request to the Division;

a) agir de sa propre initiative sans qu'une partie n'ait à lui présenter une demande;

(b) change a requirement of a rule;

b) modifier une exigence d'une règle;

(c) excuse a person from a requirement of a rule; and

c) permettre à une partie de ne pas suivre une règle;

(d) extend or shorten a time limit, before or after the time limit has passed.

d) proroger ou abréger un délai avant ou après son expiration.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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