Federal Court		Cour fédérale

Date: 20101101

Docket: IMM-4790-09

Citation: 2010 FC 1068

Ottawa, Ontario, November 1, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ALFONSO GRAU-PARRA and
MARTHA BEATRIZ SAMPEDRO-ARENAS

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated August 27, 2009, wherein the applicants were determined not to be Convention refugees or a person in need of protection under sections 96 and 97 of the Act. This conclusion was based on the Board's finding

that the principal applicant lacked credibility and lacked a well-founded fear of persecution in Colombia.

[2] The applicants request that the decision of the Board be quashed and the claim remitted for reconsideration by a differently constituted panel of the Board.

Background

[3] Alfonso Grau-Parra, the principal applicant and his common law spouse, Martha Beatriz Sampedro-Arenas, the co-applicant, are citizens of Colombia. The principal applicant alleges that due to his activities as a driver of politicians and theatre and media persons, he is perceived as having a political opinion contrary to the interests of the Revolutionary Armed Forces of Colombia (FARC). He claims to face a danger at the hands of the FARC if he returns to Colombia.

[4] The incidents of persecution included threatening phone calls received on the principal applicant's cell phone in 2003, in particular, after having transported politicians to their respective campaign sites.

[5] There is some dispute about what happened after the threatening phone calls. The Board held that the principal applicant left Colombia in October of 2003 for the United States, but returned two months later when things had cooled down. The principal applicant says this never happened

and that he only left Colombia once on August 18, 2004 to go to the U.S. and that since then, he has never returned to Colombia.

[6] In any event, the incident that caused the principal applicant to leave for good occurred in July 2004 after picking up a couple from the airport. The couple held him at gun point and had him drive to a location where they beat and intimidated him. Some colleagues who were following the principal applicant's car noticed one of the passengers climb into the front seat and called the head office. After the couple had told the principal applicant to stop the car, and began beating him, several vehicles from his office arrived and scared off the perpetrators.

[7] The co-applicant was responsible for the administration of a theatre in Colombia which cooperated with politicians. She was called by guerrillas who threatened harm against her. She ceased working for the theatre in April 2004 but received another threatening call in May of that year. After that, she stayed with a friend until her departure to the U.S. on August 18, 2004.

[8] The applicants claim that they had valid visas for the U.S. which were extended. After a while, they learned that they had been in the country too long to make an asylum claim and began to seek other options. In February 2008, they had a discussion with a lawyer from Montreal who advised them that they could come to Canada and make a refugee claim right away. On June 30, 2008, the applicants arrived in Canada and two days later claimed refugee status.

Board's Decision

[9] The Board rejected the applicants' claims on the basis that they did not have a well-founded fear of persecution for a Convention ground in Colombia. The Board drew a negative inference from the principal applicant's re-availing and not claiming asylum in the U.S. in a timely manner. The Board cited his 2003 visit to the U.S. at a time when he had been receiving threatening calls and his failure to claim protection while there. The principal applicant then returned to Colombia and thus re-availed. He even resumed the same business activities as he was doing before he left. The Board did not find it credible or reasonable for a person to put themselves in the very same situation which he had fled two months before.

[10] The Board further noted that the applicants did not claim asylum in the U.S. even though they were there for five years. They did not even inquire about it until the one year period of eligibility had lapsed. The Board did not find it reasonable that they simply relied on other people who told them that Colombians do not get asylum. The Board found their actions inconsistent with having a subjective fear.

[11] The Board also noted that while the co-applicant received threatening calls, she made no attempt to obtain protection from the police or file a complaint.

[12] Fundamentally, the principal applicant had not established that he had been targeted for political reasons. He was a successful businessman and had an advertised business phone number.

Although the Board noted that there was no mention of the July 31, 2004 attack in the Port of Entry notes, there were other problems. The Board found the whole description of the events implausible and more likely the work of common criminals than the highly armed and sophisticated FARC. When asked why he could not return to Colombia, the principal applicant indicated that it was because he would be considered a journalist. Yet there was no evidence to substantiate that his occupation was that of a journalist other than a course he had completed showing he was a communicator. The Board found this answer to be inconsistent with his Personal Information Form (PIF) and drew a further negative inference. The Board found the principal applicant's claim not to be credible and rejected it.

[13] When asked about the content of the threatening calls, the principal applicant indicated that it was actually the co-applicant who had received them. She testified that she received calls for the rental of vans at their office, but also claimed that she met the callers once at the theatre where she worked. Despite testifying to having met the persecutors, the co-applicant could not give any more details or descriptions that would have added to her story. In the end, the Board drew a negative inference from her inability to give further details and noted that some of the calls could have been more in the nature of complaints or threats directed at the theatre. Since the co-applicant could not establish that she had a well-founded fear of persecution, her claim was also rejected.

Issues

[14] The issues are as follows:

1. What is the standard of review?

2. Can the Board's credibility finding stand despite the misstatement of fact with regard to the principal applicant's return to Colombia?

3. Was the Board's ultimate conclusion unreasonable?

Applicants' Written Submissions

[15] There was no evidence that the principal applicant had left Colombia in October 2003. The evidence was that he left Colombia for the first time (with the co-applicant) in August 2004. There was no evidence that the principal applicant had returned to Colombia. Although the Board also drew negative inferences from the applicants' failure to claim refugee status in the U.S., it is impossible to divorce this from the Board's erroneous finding above.

[16] The impact of the Board's erroneous finding was significant and led to the finding that the principal applicant had re-availed himself, that he lacked credibility and that he lacked a well-founded fear of persecution. It also skewed the period that the Board considered the applicants to have failed making a claim in the U.S. It was not five years. They were in the U.S. from August 2004 to June 2008 and had legal status in the U.S. for one year. In any event, an unexplained delay in claiming refugee status would not have been determinative of their claim.

[17] The Board also erred by failing to cite the Board's persuasive decision on Colombia which recognizes the Colombian state's general inability to protect its citizens from the FARC. This was significant because the Board seemed to rely on the co-applicant's failure to contact police.

[18] The Board also erred in another aspect of its negative credibility finding. The Board improperly drew a negative inference from the failure of the applicants to disclose the final attack on the principal applicant in the Port of Entry notes. In reality, that interview was very brief and the applicants were never asked to state their entire story. It is wrong for the Board to base a negative inference on a claimant's greater level of detail in his PIF.

Respondent's Written Submissions

[19] The respondent admits that the Board may have misstated a fact regarding the principal applicant's re-availment but this misstatement was immaterial. The Board's conclusion on the applicants' credibility did not turn on this finding.

[20] The applicants were not credible regardless of the re-availment finding. The Board drew a negative inference from the fact that the final assault the principal applicant alleged was not mentioned in the Port of Entry notes. It was reasonable for the Board to do this because at the port of entry, the principal applicant was asked why he left Colombia and the principal applicant at the hearing relied on the final assault as the central aspect of his claim. The Board also did not find his description of the final assault plausible and gave reasons for this finding. The Board also found that

the co-applicant was evasive when telling her story and provided reasons for making this finding. The Board's credibility findings were also buttressed by the fact that the applicants did not claim asylum in the U.S. despite being there for four years. In all, the credibility findings against the applicants should stand.

[21] The Board did not err by failing to consider the persuasive decision. The applicants' assertion that the Board should have done so was based on their alleged fear of the FARC. The Board, however, did not accept that the FARC was targeting them, thus that document was irrelevant. In any event, the Court cannot fault the Board for not considering an internal document.

Analysis and Decision

[22] **Issue 1**

What is the standard of review?

The applicants seek to have the Board's ultimate conclusion quashed and the matter remitted back for reconsideration. The applicants say the Board misstated a fact and their contention is that this misstatement was significant to the Board's finding that the applicants lacked credibility and this, in turn, impugned the Board's ultimate conclusion that the applicants were not refugees. It is important, however, for the Court to take heed of the proper standard against which to review the Board's findings and its ultimate conclusion before determining whether the Court can interfere with the Board's ultimate conclusion.

[23] The specialized skill of the Board is to be recognized and the Board is to be afforded a significant degree of deference in its highly fact and context driven adjudication of refugee claims. The Board is in a much better position than a reviewing court to gauge the credibility and plausibility of a refugee claimant's story. A credibility finding is not a finding of mixed fact and law. It is a finding of fact. Findings of fact made by the Board may only be interfered with by a reviewing court if the finding was made in a perverse or capricious manner or without regard for the material before it (see *Federal Courts Act*, R.S.C. 1985, c. F-7, paragraph 18.1(4)(d)). Indeed, it was Parliament's express intention that administrative fact finding would command this high degree of deference (see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 46).

[24] Thus, credibility findings of the Board are to be reviewed against the statutory standard of review provided for in paragraph 18.1(4)(d) of the *Federal Courts Act* (see *Diabo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1772 at paragraph 3).

[25] Ultimate refugee determinations of the Board are reviewable against the standard of reasonableness (see *Kaleja v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 252, [2010] F.C.J. No. 291 at paragraph 19, *Sagharichi v. Canada (Minister of Employment and Immigration)* (1993) 182 N.R. 398 (F.C.A.), [1993] F.C.J. No. 796 at paragraph 3,). As such, the reviewing court will inquire into the qualities that make a decision reasonable, concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. The court will also be concerned with whether the decision falls within a range of possible,

acceptable outcomes which are defensible in respect of the facts and law (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47).

[26] A finding of fact overturned by a reviewing court may lead to a finding that the Board's ultimate decision was unreasonable but will not always. As I noted in *Haque v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 703 at paragraph 27:

> … even the existence of a real error, omission or misconstruction will not discharge the burden before the applicants. In other words, an error alone cannot be a reviewable error. Some errors may directly impugn the very merits of a decision, while other errors may be of little consequence. The above quoted paragraph from the decision in *Dunsmuir* requires courts to inquire "into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes." The applicants must ultimately establish that one of the above tests is met before the reviewing court will interfere.

[27] **Issue 2**

Can the Board's credibility finding stand despite the misstatement of fact with regard to the principal applicant's return to Colombia?

The respondent does not argue here that the Board did not misstate a fact. Rather, it is the respondent's contention that the Board's error was immaterial in the sense that its findings regarding the credibility of the applicants did not turn on this.

[28] I must reject the respondent's argument. While the Board validly pointed out inconsistencies and other problems regarding the plausibility of each applicant's story which could have been used

to support a negative credibility finding, I believe the Board's final determination of credibility was severely tainted by its error.

[29] The Board's credibility finding was based on a number of factors but a key aspect was that it was implausible that the principal applicant would be threatened by the FARC and then return not only to Colombia, but to the same city and the same workplace where the threat had taken place. This finding was front and centre in the Board's written reasons for its decision. It was clearly not a minor or peripheral matter for the Board.

[30] Because the factual determination of credibility was at least in part based on a grave misunderstanding of a key fact, I have little choice but to hold that it was made in a capricious manner without regard for the evidence. As such, I would interfere in the Board's finding of credibility and hold that it was made in error.

[31] **Issue 3**

Was the Board's ultimate conclusion unreasonable?

The applicants have raised several other aspects of the decision in which it says the Board erred which in total render the Board's decision unreasonable. In my view, it is unnecessary to wade into those aspects of the decision. The Board's erroneous finding of credibility is sufficient in my view to render the Board's ultimate conclusion unreasonable.

[32] The error in relation to the Board's credibility finding went to the very heart of the Board's ultimate conclusion. Naturally and quite logically, a negative credibility finding will damage a refugee claimant's ability to establish the central elements of his claim. In this case, the Board found the applicants' story of persecution at the hands of the FARC less than convincing and used the misstated fact of the principal applicant's re-availment to build its case against the existence of any well-founded fear.

[33] The error in question had significant and permeating effects and I am of the view that it rendered the Board's ultimate conclusion unreasonable. The error robs the decision of a justifiable base. I am unable to determine how the Board would have concluded in the absence of the error. The Board did not make any separate determinative finding that was sufficiently independent of the error.

[34] The law requires that the applicants be awarded another opportunity to present their case before the Board and for a reasonable decision to be made.

[35] The application for judicial review is therefore allowed and the matter is referred to a differently constituted panel of the Board for redetermination.

[36] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[37] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a differently constituted panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

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

72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97.(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of	97.(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la

nationality, their country of former habitual residence, would subject them personally

nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

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

a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;

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

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

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

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

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l’incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d’une catégorie de

also a person in need of protection.	personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4790-09
STYLE OF CAUSE:	ALFONSO GRAU-PARRA and MARTHA BEATRIZ SAMPEDRO-ARENAS - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 5, 2010
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	November 1, 2010

APPEARANCES:

Douglas Lehrer	FOR THE APPLICANTS
Khatidja Moloo	FOR THE RESPONDENT

SOLICITORS OF RECORD:

VanderVennen Lehrer Toronto, Ontario	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT