Federal Court  Cour fédérale

Date: 20110315

Docket: IMM-4149-10

Citation: 2011 FC 312

Ottawa, Ontario, March 15, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

PICKTON ALFONSO EARL
JOAN ROSEMARIE EARL AND
RANDY JAMES MADANNY EARL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

A. INTRODUCTION

[1] This is an application for judicial review of a decision of a member of the Immigration and Refugee Board ("Board"), pursuant to s.72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 (the "*Act*") by Pickton Alfonso Earl, Joan Rosemarie Earl and Randy James Madanny Earl (the "applicants"). The Board determined that the applicants were neither Convention refugees nor persons in need of protection under s.96 and s.97 of the *Act*.

B. FACTS

[2] The applicants are all citizens of Jamaica. The principal applicant, Pickton Earl, worked as Minister at the Mt. Refuge Church of the First Born from 1979 until 2001, when he and his family left Jamaica.

[3] In 2001, the principal applicant was outside of his church prior to giving a service when a man known as Bigger who had borrowed or rented a car from a man called Tucker, to use as a taxi, claimed that Tucker had cheated him. Tucker was inside the church for the service. The principal applicant attempted to calm Bigger down and encouraged him to desist until after the service which he did. Bigger supposedly told him that if Tucker left before he could deal with him, the applicant would be held responsible. After the service, Tucker was nowhere to be found. In the presence of other churchgoers, Bigger hit the applicant over the head from behind with a machete and stated that he would seek revenge on the applicant for allowing Tucker to escape.

[4] The applicant went to the local police station that day to make a complaint, but the police refused to get involved on grounds of insufficient evidence. The applicant went to a different police station on the same day, and was told the same thing. He did not take Tucker with him, nor did he inform Tucker that he had been to the police, and did not verify if any report had actually been filed.

[5] The applicant alleges that after this incident, Bigger came several times to both the church and the applicant’s house, further threatening him.

[6] The applicant and his family came to Canada on August 16, 2001. They lived here on temporary visitor visas for several years. On June 6, 2006, they applied for permanent residence with the help of the church. This application was rejected, as was the applicant's application for judicial review of this decision (*Earl v MCI*, 2008 FC 1144). On November 4, 2008, the applicants applied for refugee status.

[7] The hearing took place on May 7, 2010. The decision was issued on June 18, 2010 and received by the applicants on July 6, 2010.

C. The decision under review

[8] The Board found that the determinative issues were the existence of state protection and the applicant's failure to take appropriate steps to obtain protection, the lack of evidence of subjective fear due to the long delay before the applicants applied for refugee status, and the lack of evidence of prospective risk should the applicants return to Jamaica.

[9] The Board noted the presumption that state protection exists except where the state is in complete breakdown. The Board canvassed the documentation and found that Jamaica is a constitutional parliamentary democracy with generally free and fair elections. The Board described the various branches of security forces in Jamaica, and noted that the Jamaican Constabulary Force had bolstered community policing to counteract the antipathy between residents and police. The Board noted that there is still some perception of corruption. Though issues existed, the Board found that overall, Jamaican security forces have effective control of the territory, and constitute a functional force to uphold the laws and the constitution. The Board canvassed the jurisprudence

regarding state protection, noting the burden on the applicants to rebut the presumption of its existence, and the fact that there must not be simply a subjective reluctance to engage the state.

[10] It must be noted that in this section of its analysis, the Board referred to “Mexico” instead of “Jamaica”, on several occasions including a reference to Mexico having free and fair elections and a relatively independent judiciary.

[11] The Board noted that the applicant did report the attack to the police and received the same answer from two different police stations. The Board found that the consistency of the police response supported their decision not to take action, and noted that the applicant had not included Tucker in his attempts to go to the police, and did not verify that the stations had recorded his complaint. The Board found that it would be unreasonable in any society to expect that all violent acts reported will result in immediate prosecutions or convictions. The Board found no indication that there was a lack of genuine and earnest effort on the part of the Jamaican police.

[12] The Board took note of the applicant’s statement that he had no confidence in the police because of their negative response. The applicant stated that as Bigger had once helped a political party, the party would support him, and testified that Bigger could have had a police report disclosed to him. The Board noted that the applicant had no evidence for this other than hearing it from someone. The Board found this unpersuasive and not backed up by the documentary evidence.

[13] The Board acknowledged and said it had considered documentation regarding the inefficiency and corruption that exists in Jamaican security forces, but weighted this against persuasive evidence that Jamaica candidly acknowledges these issues and has made serious efforts to rectify the problems. The applicant had not rebutted the presumption. The Board said that there was also no persuasive evidence that the applicant would face persecution or any of the risks listed in s.97 if he were to return, though again the Board states "return to Mexico" instead of "Jamaica".

[14] Regarding the existence of a well-founded fear of persecution, the Board noted the seven-year delay before the applicants applied for refugee status. The Board found that this weakened the credibility of the applicant's subjective fear of return. The Board also found that in the nine years since leaving Jamaica, the applicant had no news of Bigger, and no knowledge of whether he still wanted vengeance or even lived in the area. The Board found that the applicant's fear of persecution upon his return was entirely speculative and unlikely. The Board found that the applicants' refugee claim was secondary in connection to seeking status to stay in Canada.

D. Relevant legislation

The relevant portions of the *Act* are as follows:

Convention refugee	Définition de « réfugié »
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, (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	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) 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.
Person in need of protection 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 nationality, their country of former habitual residence, would subject them personally (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (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, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care. Person in need of protection (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 also a person in need of protection.	Personne à protéger 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 nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée : 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats. Personne à protéger (2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

E. Issues and Standard of Review

[15] This application raises the following issues:

a. Did the Board err by referring to the wrong country in its state protection analysis?

b. Did the Board err in assessing the evidence related to the availability of state protection?

c. Did the Board err in assessing the applicant's subjective fear?

Standard of review

- The applicable standard for the issues raised by this application is reasonableness.

[16] In *Saeed v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1016, para. 35, and *Collins v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1403, para. 10, it has been held that the analysis for state protection is reviewable on the standard of reasonableness. This standard also applies to the Board's assessment and weighing of the documentary evidence (*Zhang v Canada (Minister of Citizenship and Immigration)*, 2010 FC 9, para. 34; *Malveda v Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 527). As the question of the existence of subjective fear is a question of fact, it is for the Board to assess, and should also be reviewed on the standard of reasonableness, *Dunsmuir v New Brunswick*, 2008 SCC 9 at para. 47.

F. ANALYSIS

a) References to Mexico instead of Jamaica

[17] We have reproduced all of the Board's references to Mexico in place of Jamaica:

> (10)…….In a functioning democracy, a claimant will have a heavy burden when attempting to show that they should not have been required to exhaust all of the recourses available to them domestically before claiming refugee status. The documentary evidence before the Board indicates that Mexico is a democracy, and there are free and fair elections. (para. 10;

> footnoted to US Department of State Report on Jamaica 2008). There is a relatively independent and impartial judiciary. Therefore, in countries such as Mexico, the claimant must do more than merely show that he or she went to see members of the police force and that those efforts were unsuccessful. (para. 10)
>
> Therefore, having considered the totality of the evidence, I find that the principal claimant, in the circumstances of this case, has failed to rebut the presumption of state protection with clear and convincing evidence and that the claimant did not take all reasonable steps in the circumstances to avail himself of that protection before making a claim for refugee protection. Therefore, I am not persuaded that the state of Mexico would not be reasonably forthcoming with state protection, should the claimant seek it. (para. 18)
>
> There is no persuasive evidence before me that the principal claimant would face persecution or, on a balance of probabilities, face a risk to his life or to cruel and unusual treatment or punishment or a risk of torture, if he returned to Mexico. (para. 19)

[18] The applicant argues that the discussion of state protection is the largest portion of the Board's analysis, and notes that the analysis of Mexico is irrelevant. The applicant submits that it is impossible to conclude with certainty what part the consideration of extrinsic or irrelevant evidence played in the Board's decision. The applicant cites Justice Hugessen's decision in *B'Ghiel v Canada (MCI)*, [1998] F.C.J. No. 1023, para. 8, where it was held that the judge could not determine which weight the Immigration Officer had given to the correct factors, and "what weight was attached to the factors which were improperly considered", and that therefore the decision must be quashed.

[19] The applicant also cites *Martinez v MCI*, (IMM-3598-08), an unreported case, in which Justice Barnes stated "[the] decision appears to have been issued without a thorough proof-reading because it contains a number of regrettable typographical errors and editorial mistakes". The applicant states that this led Justice Barnes to conclude that it would be difficult to be confident that the Board was doing more than going through the motions in reaching its conclusion on state

protection. The applicant argues that the errors in the present case cast doubt on the entire decision, given the importance of the state protection analysis.

[20] In the applicant's reply memorandum, it is further argued that the respondent's contention that the errors were 'inadvertent' is speculative, and also that the few sections where the Board does refer to Jamaica are supportive of the applicant's position.

[21] The respondent replies that the references to Mexico are immaterial and constitute typographical errors, as each one is only in the context of a generalized statement that is generally found into any state protection analysis. This does not affect the numerous references to Jamaica throughout the Board's analysis. Furthermore, prior to the one non-generalized statement that Mexico is a democracy with free elections, the respondent notes that the Board had found that Jamaica was a constitutional parliamentary democracy with generally free and fair elections at paragraph 6 of its decision.

[22] The respondent argues that the boilerplate paragraphs using "Mexico" are not critical, and do not indicate that the Board failed to consider the country conditions specific to Jamaica, especially since the Board clearly cites Jamaica in all other specific references (paras. 14-17). The respondent submits that the reasons must be read as a whole, and that the Board clearly knew it was dealing with Jamaica, and engaged in a detailed analysis of the Jamaican security forces and the justice system. Moreover, the respondent points to the transcript of the hearing, and submits that the Board knew that it was Jamaica in question, not Mexico, and the Board only relied on documents about Jamaica.

[23] The respondent cites *Miranda v MEI* (1993) 63 FTR 81 (FCTD):

> For purposes of judicial review, however, it is my view that a Refugee Board decision must be interpreted as a whole. One might approach it with a pathologist's scalpel, subject it to a microscopic examination or perform a kind of semantic autopsy on particular statements found in the decision. But mostly, in my view, the decision must be analyzed in the context of the evidence itself. I believe it is an effective way to decide if the conclusions reached were reasonable or patently unreasonable.

Analysis

[24] Firstly, this Court does not find that *B'ghiel* is relevant to the present case. In that case, the Immigration Officer, in determining in the context of a residency application whether the applicant would be able to adapt to living in Canada, included several irrelevant factors in her consideration. As these were only some of the factors she considered in rejecting the application, the judge found that it was impossible to determine how she had weighted the factors. This is distinguishable from the present case, where the mistakes in the decision are not, with one exception, in the nature of fact finding or individual factors.

[25] There are two other cases in which a Board's decision made a similar error with regards to identifying the country at issue in the state protection analysis. In *Fernandez v MCI*, 2005 FC 536, the Board was found to have discussed Brazil instead of Argentina, and Justice Rouleau found at para. 20 that "there were doubts, when I read Brazil in the RPD's decision (written several times), that the analysis on the risks faced by the applicants in Argentina was not properly assessed. Thus, the confusion on the country has an impact on the analysis and the decision cannot stand." In *Landaverde v MCI*, 2005 FC 1665, Justice O'Keefe found at para. 36, that the Board had incorrectly

dealt with state protection in Guatemala instead of El Salvador, and that "[t]he only references to a fear of persecution in the Board's decision are in respect of Guatemala, not El Salvador".

[26] The Board's mistakes in the present case do not rise to the level referred to in *Fernandez* and *Landaverde*. Unlike in those cases, it is apparent upon reading the decision that the Board is in fact referring to Jamaica. The paragraphs referring to Mexico are generalized often used paragraphs regarding the jurisprudence on state protection, and I note that the one more specific "finding" made regarding Mexico being a democracy with free elections actually cites country documentation on Jamaica. Furthermore, the same finding is explicitly made about Jamaica earlier in the decision.

[27] While this error raises concerns about the apparent lack of proof-reading in this decision, I am not convinced in a reading of it that the Board was actually intending to discuss Mexico and therefore it does not render the decision void.

b) Assessment of state protection and the documentary evidence

[28] The applicant cites at length from *Cepeda-Gutierrez v MCI* (1998), 157 FTR 35, para. 17, where Justice Evans stated:

> …The more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence". […] Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion; it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[29] The applicant acknowledges that the Board is presumed to have weighed and considered all the evidence unless the contrary is established. However, the applicant points out that when the documentary evidence is contradictory, the Board has a duty to address how and why it chose to rely on some evidence over the rest (*Flores v Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 565; *Antunes v MEI*, [1991] F.C.J. No. 154).

[30] The applicant contends that the Board only referred to two documents (the US Department of State Report, and an Amnesty International country report). The applicant takes issue with paragraph 7 of the Board's reasons, in which the Board describes the Jamaican security forces, notes that there are some issues with regard to the perception of corruption, and then remarks that "after reviewing the above information" it has concluded that overall the evidence "indicates that the security forces in Jamaica have effective control of its territory and have in place a functioning security force to uphold the laws and constitution of the country". The applicant argues that the Board did not review any substantive evidence nor cite any documentation, but merely described the security forces. The applicant notes that the next reference to a country is not until paragraph 10, where the Board refers to Mexico. The applicant then finds that the Board refers to Jamaica in paragraph 15, eight paragraphs after referring to what the applicant terms "non-existent country condition documents".

[31] The applicant argues that as no specific citations were included for paragraphs 15 and 16 on the specifics of policing in Jamaica, the Board has not provided any documentary evidence in support of its conclusions. The applicant notes that the sole reference to the Amnesty International report is to discount it, though the applicant contends that this report is one of the most important, as

it establishes that many Jamaican police officers have been accused of human rights violations, and that gang violence is widespread. The applicant argues that this evidence is more on point than any reference to community policing as found by the Board. The applicant cites several portions of the documentary evidence on gang violence and human rights violations, and notes that the Board did not mention these. The applicant contends that these reports "squarely contradict the Member's findings" and should have been referred to. The applicant cites in support of this proposition *Tetik v MCI*, 2009 FC 1240, where Justice de Montigny overturned a decision in part because the Board dealt with state protection in Turkey in a general sense, without dealing with the fact that the applicants in that case were Armenian, or that they lived outside of Istanbul.

[32] The applicant also argues that a significant amount of the documentary evidence does in fact support the applicant's testimony at the hearing to the effect that there is no effective state protection in Jamaica. The applicant tried to obtain police assistance, but did not receive any, and he argues that this is consistent with the documentation. The applicant does not cite any documents in particular, other than referring to the afore-mentioned reports on gang violence and human rights violations.

[33] In the applicant's reply memorandum, counsel also takes issue with the respondent's characterization of the test for state protection as adequacy rather than effectiveness, and argues that adequacy implies effectiveness as a necessary element. The applicant cites *Aguirre v MCI*, 2010 FC 916, para. 20:

> The case law is replete with statements confirming that it is not sufficient for a state to make efforts to provide protection; an objective assessment must also establish that the state is able to do so in practice. […] the Panel does not…refer to any documentary evidence showing that the resources devoted to combating crime have produced any tangible results.

[34] The respondent submits that it was reasonable to find that the applicant had not taken all reasonable steps to seek the assistance of the state. The respondent notes that a single refusal by the authorities to assist will not meet the threshold necessary to rebut the presumption of state protection, and that it is not enough to give up after one bad experience (*Morales Lozada v MCI*, 2008 FC 397, paras. 27-30; *Sanchez v MCI*, 2008 FC 134, paras. 9, 12; *Kadenko v MCI* (1996), 143 DLR (4th) 532 at 534 (FCA)). The respondent reiterates the Board's findings that the applicant did not inquire as to whether a police report had been filed, did not return to the police station with Tucker in order to provide further evidence, and did not report to the police that Bigger was stalking him.

[35] The respondent argues that the onus is not on the Board to establish state protection, but rather on the applicant to rebut the presumption of state protection where, as in this case, it is found that the country in question is a functioning democracy. The respondent cites *Ward v Canada*, [1993] 2 SCR 689, para. 50 and *Carrillo v MCI*, 2008 FCA 94, paras. 18-19, 26, 30. The respondent notes that the test for state protection is whether it is adequate, not whether it is perfectly effective, as per *Flores v MCI*, 2008 FC 723, para. 11, where it was noted that "[r]equiring effectiveness of other countries' authorities would be to ask of them what our own country is not always able to provide." The respondent argues that to require effective protection is an unattainable standard, and would shift the burden of establishing state protection to the Board, rather than leaving it with the applicant, as it should be. The respondent also refers to *Samuel v MCI*, 2008 FC 762, paras. 10 and 13, and *Mendez v MCI*, 2008 FC 584, para. 23.

[36] Regarding the weighing of evidence, the respondent argues that it is not the role of this Court to reweigh the evidence, and notes that the Board found that Jamaica had security forces that deal with criminal activity. The respondent notes that it is trite law that the Board is presumed to have reviewed and considered all of the evidence, and there is no obligation for the Board to refer to each piece (*Hassan v MEI*, [1992] 147 NR 318 (FCA)). The respondent argues that the documents cited in the applicants' arguments relate to security problems faced by those living in poverty in inner-city ghettos rife with gang violence, and argues that this evidence is irrelevant to the applicant's case.

[37] The respondent notes that the applicant's statements that someone like Bigger was protected by a political party and could have had police reports disclosed to him was not supported by any documentary evidence, contrary to the applicant's argument.

Analysis

[38] It is well established law that the threshold necessary to rebut the presumption of State protection is such that an applicant must take all necessary steps to avail itself of the assistance of the state. It has also been held that one refusal will not suffice to rebut the presumption of state protection (See *Kadenko v MCI* (1996), 143 DLR (4^{th}) 532 at 534 FCA. *Morales Lozada v MCI*, 2008 FC 397 paras. 28 to 30. In reviewing the Board's decision in the present case I find it reasonable to find that the applicant had not taken all the necessary steps to obtain the assistance of the authorities.

[39] Similarly the Board's weighing of the country documentation is reasonable in the present case. The onus being on the applicant to rebut the presumption of state protection and since the Board is presumed to have considered all of the evidence, without the need to mention each document, I am not persuaded when the applicant points to evidence that it feels should have been mentioned. The applicant must establish a true connection between the evidence it claims has been ignored and its relevance to the applicants' allegations in this case that the Jamaican police would be incapable of providing adequate protection. I do not find that the evidence cited by the applicant rises to the level discussed in *Cepeda-Gutierrez*, as documents discussing human rights violations by police officers, and gang violence in Jamaican cities, are irrelevant to the present case. No such issues were raised, nor do I see any connection to the applicant's story, and therefore I do not see why the Board would have been required to discuss and explain why it did not give weight to these reports. Having reviewed the case of *Tetik*, cited by the applicants, I do not believe that any similar issues exist with regard to the analysis in the present case, as no special circumstances were alleged that should have been mentioned.

[40] Justice Mosley's decision in *Flores v MCI*, 2008 FC 723, is particularly applicable in the present case with respect to the applicants argument with respect to effectiveness of state protection where he writes:

> 8 The applicants argued in their written submissions that the legal test for a finding of state protection was whether that protection was effective, citing Carrillo v. Canada (Minister of Citizenship & Immigration), 2007 FC 320, [2008] 1 F.C.R. 3 (F.C.). In the interim between the filing of the representations and the hearing, that decision had been overturned by the Federal Court of Appeal in Carrillo v. Canada (Minister of Citizenship & Immigration), 2008 FCA 94, [2008] F.C.J. No. 399 (F.C.A.) which confirmed that the test is adequacy rather than effectiveness per se.

> 9 The applicants contend, nonetheless, that it remains an error for an RPD panel to fail to consider whether the measures it deems adequate are at least minimally effective.
>
> 10 While this is an attractive argument, it does not convey the current state of the law in Canada in my view. As noted by the Federal Court of Appeal in Carrillo, the decision of the Supreme Court in Ward v. Canada (Minister of Employment & Immigration), [1993] 2 S.C.R. 689 (S.C.C.) stressed that refugee protection is a surrogate for the protection of a claimant's own state. When that state is a democratic society, such as Mexico, albeit one facing significant challenges with corruption and other criminality, the quality of the evidence necessary to rebut the presumption will be higher. It is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation: Canada (Minister of Employment & Immigration) v. Villafranca (1992), 18 Imm. L.R. (2d) 130 (Fed. C.A.) .
>
> 11 The serious efforts to provide protection noted by the panel member support the presumption set out in Ward. Requiring effectiveness of other countries' authorities would be to ask of them what our own country is not always able to provide.

[41] In light of this jurisprudence, I find that the Board did not use the incorrect test in determining state protection.

c) Assessment of the applicant's subjective fear

[42] The applicant argues that as he always had legal status in Canada, it was not necessary for him to claim refugee status until the sudden possibility of a forced return to Jamaica made it imperative. He argues that it is generally highly questionable whether this factor in and of itself is sufficient to warrant an adverse credibility finding, and that the Board must carefully consider the applicant's explanations and give good reason for rejecting them. The applicant argues that the Board confused legitimate attempts to remain outside of Jamaica with a lack of subjective fear, and notes that as long as the applicant was in possession of legal residence in Canada, there was no immediate need to seek protection. The applicant cites *Hue v Canada (MEI)*, [1998] F.C.J. No. 283

(FCA), where it was said that "as long as [the applicant] had his sailor's papers and a ship to sail on, he did not have to seek protection". The applicant argues that his desire to seek permanent residence in Canada was a sign of his subjective fear that was overlooked by the Board.

[43] The applicant cites at length from *Gyawali v Canada (MCI)*, 2003 FC 1122, where Justice Tremblay-Lamer noted that a failure to apply as a refugee immediately upon arrival can be an important factor to consider in determining a claimant's credibility (para. 16), but that in the circumstances of that case as well as *Hue*, there was no need to apply immediately as the applicants were safe for the time being, and it was not reasonable for the Board to draw any negative inference against the applicant (paras. 18-19).

[44] The respondent submits that with a seven-year delay before the applicants applied for refugee status, it was open to the Board to reasonably find that they did not have any subjective fear. The respondent notes that until 2006, the applicants were in Canada on temporary visas and had no permanent status.

[45] Furthermore, the respondent notes that the Board found that there was no reasonable fear of persecution upon their return to Jamaica, and that their claims in this regard were speculative, as there had been no news of Bigger in the nine years of their absence. The respondent argues that it is well-established that the test for persecution is prospective and that the applicants must fear harm on an ongoing basis. It was therefore open to the Board, according to the Respondent to find that given the long delay and the lack of evidence showing an ongoing threat, such a threat no longer existed. The respondent cites para. 16 of *Pour-Shariah v MEI*, [1994] F.C.J. No. 1928 (FCTD):

> an individual will often advance evidence of past persecution. This evidence may demonstrate that he/she has been subjected to a pattern of persecution in his/her country of origin in the past. But this is insufficient of itself. The test for Convention refugee status is prospective, not retrospective.

Analysis

[46] The cases of *Hue* and *Gyawali* do in fact leave open the possibility that it was unreasonable of the Board to rely on the delay in seeking refugee status, when the applicants had legal status in Canada during that delay. I note however that there are cases that have reached the opposite conclusion as well, as noted in *Taruvinga v MCI*, 2007 FC 1264, para. 11:

> It is well-established that the Board may find that the Applicants' delay is not consistent with those of people having a subjective fear of persecution (Bello v. Canada (Minister of Citizenship & Immigration), [1997] F.C.J. No. 446 (Fed. T.D.) ; Heer v. Canada (Minister of Employment & Immigration), [1988] F.C.J. No. 330 (Fed. C.A.)).

[47] The entire judgment in *Heer* is as follows:

> While being of the view that the Immigration Appeal Board may have placed undue emphasis on the importance of the delay in making the claim for refugee status herein, we agree with the Board, nevertheless, that such a circumstance is an important factor which the Board is entitled to consider in weighing a claim for refugee status. On the record, we are unable to say that the Board committed any reviewable error that would entitle the Court to interfere with its decision. The Section 28 application will, therefore, be dismissed.

[48] When applied to the facts of this case the Board‘s comments with respect to the applicant’s delay before legitimizing his status from temporary to permanent does not in itself render the decision unreasonable, as that was up to the Board to decide and it was one factor amongst others to be taken onto consideration in assessing the Applicant’s subjective fear of persecution.

CONCLUSION

[49] I further conclude that the Board did not err in its assessment of the evidence related to the availability of state protection;

[50] I further conclude that the Board did not err in assessing the applicant's subjective fear;

JUDGEMENT

THIS COURT ORDERS AND ADJUGES that:

- The application for judicial review is dismissed and no question of general importance is certified.

"André F.J. Scott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4149-10
STYLE OF CAUSE:	PICKTON ALFONSO EARL JOAN ROSEMARIE EARL RANDY JAMES MADANNY EARL V THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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