Federal Court  Cour fédérale

Date: 20120319

Docket: IMM-5038-11

Citation: 2012 FC 323

Ottawa, Ontario, March 19, 2012

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

REINALDO SUAREZ ROSALES
NORIS DIONISIA HERNANDEZ HERNANDEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicants, a wife and husband from Cuba, challenge the Immigration and Refugee Board's (Board) decision denying their refugee claim, which was grounded in a fear of persecution due to their political opinion.

II. BACKGROUND

[2] According to the Applicants' narrative, they ran a bed and breakfast (B&B) business in a tourist area of Cuba. They were therefore in contact with tourists who were interested in the daily lives of Cubans.

[3] The principal Applicant Hernandez had travelled to Canada under a multi-entry Temporary Resident Visa (TRV) on two occasions to visit family. It was during these trips that she became aware of events in Cuba that were not reported in the Cuban media, such as the incarceration of certain dissidents.

[4] Central to the Applicants' claim is the alleged stay of two guests at the B&B: a Cuban woman and an Italian tourist. The Italian would apparently participate in conversations Hernandez had with her neighbours about events and what she had read concerning Cuba while in Canada. He asked about life from the Cuban perspective including such matters as the use of ration books and the prohibitions against locals using certain of the beaches in the tourist area.

[5] Following the visit of the Cuban woman and Italian tourist, the Applicants claimed that State Security members took them in for questioning, searched their home and confiscated their electronic equipment. Their business license to operate the B&B was also cancelled.

[6] The Applicants thereafter received regular visits from the senior party official, were taken in for questioning and forced to sign a warning letter restricting them from talking to anyone about the Cuban state, breach of which could result in a 3-5 year prison sentence.

[7] The Applicants concluded that the Cuban woman who had visited with the Italian tourist was a state security informant. They also concluded that it would be best to leave Cuba as they were now under suspicion.

[8] Although the principal Applicant Hernandez had a TRV and her husband was able to obtain one in February 2010, they needed exit visas. Before these exit visas were obtained in March 2010, State Security personnel warned them that they should remain outside Cuba as they were no longer welcome in Cuba. The Applicants suggest that the exit visas were issued to exile them from Cuba.

[9] The Board, in dismissing the refugee claim, found against the Applicants on the basis of credibility. The Board found both an absence of reliable documentary evidence and a lack of consistent testimony on the documentary evidence. The pivotal event of the stay of the Cuban woman and Italian tourist at the B&B suffered from an absence of reliable corroborative evidence.

[10] The Board focused on the evidence of the rent receipts for the Cuban/Italian visit; the integral inconsistency of the documents both as to dates and amounts. It is evident that the Applicants' constantly changing explanations for these inconsistencies led to the Board's conclusion that the evidence was fabricated.

[11] The Board also noted the absence of any objective evidence that the Applicants had been labelled as "political" or that they were running a B&B when the pivotal events of September 2009 occurred.

[12] The Board dismissed the claimed fear of arrest upon return to Cuba. The Board reasoned that the Cuban authorities would not issue an exit visa to "politically unreliable" persons.

[13] As to the Applicants' claim that, having overstayed their exit visa, they would be denied entry to Cuba, the Board concluded that they had not even tried to extend the exit visas.

[14] Finally, both at the Board hearing and subsequently, the Applicants claimed that they would be punished for breach of the exit visa and returning to Cuba and that Cuban law with respect to "dangerousness" was persecutory in nature. These arguments were dismissed due to lack of evidence as to being punished for making a refugee claim in Canada or for being "political" since their pivotal incident was not credible.

III. ANALYSIS

[15] The standard of review of a Board decision grounded in credibility and plausibility is generally reasonableness (see *Dong v Canada (Minister of Citizenship and Immigration)*, 2010 FC 55). The assignment of weight and the interpretation and assessment of evidence is also held to a reasonableness standard (see *N.O.O v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045).

[16] While the parties appear to consider "reasonableness" as the standard in respect of the persecuting nature of Cuban law, I disagree. Whether the Cuban exit laws which contemplate prosecution and possible imprisonment amount to "persecution" under s. 96 of the *Immigration and*

Refugee Protection Act (IRPA) or "cruel and unusual punishment" under s. 97 of IRPA is a matter of a law of general application, and involves considerations of domestic and international law. As such, the Board's conclusion should be assessed on a correctness standard.

[17] With respect to the Board's credibility finding, it is well settled law that not only is the finding subject to a reasonableness standard, considerable deference is owed to the Board as the trier of fact (*Khan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1330 at para 30).

[18] The Board's finding is clearly influenced by the Applicants' continually changing explanations. The Board is in a superior position to a reviewing court in terms of observations of the witnesses particularly when confronted with difficult inconsistencies.

[19] Concerns about credibility impact the assessment of documentary evidence or the absence thereof. The need for corroboration is even more important where credibility is in issue. The Court is to look at the finding as a whole and in context without microscopic analysis.

[20] In this case the Board's credibility finding is reasonable – the conclusions reached were properly open to the Board. The Applicants put in evidence documents which had errors and discrepancies and the Board found, as it was entitled to do, that the Applicants' explanations were not supportable.

[21] The circumstances of the errors and inconsistencies went to the root of the Applicants' claim. These errors, inconsistencies and the wavering explanations related specifically to whether

the Applicants operated a B&B at the relevant times, a matter that underpinned the story of the Cuban woman and the Italian tourist.

[22] As to the issue of whether prosecution for a breach of an exit permit is persecutory, the Applicants have at least two difficulties – firstly, the Applicants created the breach; secondly, Cuban exit laws have not been found to be persecutory.

[23] In *Valentin v Canada (Minister of Employment and Immigration) (F.C.A.),* [1991] 3 FC 390, the Federal Court of Appeal held that an applicant cannot self-induce a positive claim for refugee status. This principle was followed in *Perez v Canada (Minister of Citizenship and Immigration),* 2010 FC 833, with respect to overstaying a Cuban exit visa in relation to both IRPA ss. 96 and 97.

[24] In the present case, the Board noted the Applicants' failure to seek an extension of their exit visas even though it is normal to be able to extend such a visa for 11 months and possibly even longer.

[25] In *Galvez v Canada (Minister of Citizenship and Immigration),* 2004 FC 1690, this Court upheld the Board's conclusion that Cuban exit laws themselves were not persecutory. In the present case, there is no evidence that the law would be applied to the Applicants in a persecutory manner.

[26] Therefore, the Board was correct in its conclusions that the exit laws were not persecutory and that the Applicants cannot self-induce their refugee claim. The Board's conclusion that there

was no evidence that the Applicants would be subject to persecutory application of the laws is reasonable.

IV. CONCLUSION

[27] For these reasons, this judicial review will be dismissed. There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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