Federal Court  Cour fédérale

Date: 20120612

Docket: IMM-6048-11

Citation: 2012 FC 703

Ottawa, Ontario, this 12th day of June 2012

Present: The Honourable Mr. Justice Pinard

BETWEEN:

JOSE LUIS AYALA ALVAREZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] On September 2, 2011, Jose Luis Ayala Alvarez (the "applicant") filed the present application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the "Board"), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"). The Board had denied the applicant's claim for refugee status.

[2] The applicant is a citizen of El Salvador. He is blind in one eye and has very poor vision in the other. The applicant was raised by his grandparents, his parents having left El Salvador, obtaining permanent resident status in the United States in 2000. In 2000, the applicant filed a U.S. sponsorship application. The applicant's half brother had already fled to the U.S., having formerly been the leader of the AC/DC, a criminal gang in El Salvador, tied to the Mara 18, one of the most prominent gangs in the country. The applicant's problems in El Salvador are alleged to have begun in 2004.

[3] In its decision dated July 14, 2011, the Board rejected the applicant's claim for refugee status, having considered all of the evidence. The Board found that state protection was available in El Salvador and that the applicant was not credible with regards to his allegations of forcible recruitment.

[4] The issues raised by the present application for judicial review can be summarized as follow:

> Did the Board err, basing its decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the evidence before it, notably in concluding that:
>
> i) The applicant was not credible;
>
> ii) State protection was available in El Salvador?

[5] These determinations, the first being a question of fact and the second a mixed question of fact and law (*Rovirosa et al. v. Minister of Citizenship and Immigration*, 2011 FC 48 at para 5 [*Rovirosa*]; *Velasquez v. Minister of Citizenship and Immigration*, 2009 FC 109 at para 13 [*Velasquez*]), are to be reviewed on a standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*]; *Aguebor v. Minister of Employment and*

Immigration (1993), 160 N.R. 315 (F.C.A.) at para 4; *Paniagua v. Minister of Citizenship and Immigration*, 2008 FC 1085 at para 5 [*Paniagua*]). Thus, this Court must determine whether the Board's decision is justified, transparent and intelligible, falling within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above at para 47).

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i. *Did the Board err in its assessment of the applicant's credibility, basing its decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the evidence before it?*

[6] The applicant claims the Board erred in its assessment of his credibility by failing to consider all of the relevant evidence before it. The applicant had explained to the Board why he had been targeted by the gang in spite of his disability. Furthermore, the applicant argues that at the hearing, his counsel had explained that the Maras took an interest in him because of his brother's past involvement. This is not acknowledged by the Board, whereas it had the obligation to mention the evidence in contradiction of its findings (*Cepeda-Gutierrez v. Minister of Citizenship and Immigration* (1998), 157 F.T.R. 35). Thus, the Board failed to consider the Maras' recruitment tactics and motivations. Therefore, the Board's assessment of the applicant's credibility is unreasonable, having been made without regard to the material before it.

[7] The respondent asserts that the Board's decision and findings are reasonable, having been made in consideration of all the evidence before it.

[8] The Board's implausibility finding was based on the absence of documentary evidence indicating that gangs recruit people with disabilities. Therefore, the Board did not have to specifically mention the applicant's brother's ties with the Mara 18, nor did the Board have the obligation to mention every piece of evidence before it. When the Board's decision is read as a whole, it is clear that it considered why the applicant claimed to be targeted by gang members in El Salvador. Thus, the Board did not ignore the evidence before it.

[9] Upon reviewing the evidence, I find that this Court's intervention is unwarranted, the applicant having failed to establish that the Board's findings are unreasonable. While this Court may have concluded otherwise, it is not my role to substitute my discretion for that of the Board, the Board having considered the evidence before it (*Oduro v. Minister of Employment and Immigration* (1993), 66 F.T.R. 106, at paragraphs 13 and 14). The Board had the benefit of hearing the applicant's testimony and its findings of fact are given great deference (*Velasquez*, above at para 12): "the determination of an applicant's credibility is at the heartland of the Board's jurisdiction" (*R.K.L. v. Minister of Citizenship and Immigration*, 2003 FCT 116, 228 F.T.R. 43 at para 7). It was open to the Board to reject the applicant's explanation and give greater weight to the documentary evidence. As explained by Justice Joyal in *Miranda v. Minister of Employment and Immigration* (1993), 63 F.T.R. 81:

> . . . There can always be conflict in the evidence. There is always the possibility of an opposite decision from a differently constituted Board. Anyone might have reached a different conclusion. . . .

[10] The Board was under no obligation to mention every piece of evidence and is presumed to have weighed and considered all of the evidence before it (*Ayala v. Minister of Citizenship and*

Immigration, 2007 FC 690 at para 23 [*Ayala*]). The Board did mention that the applicant's brother was a former gang member, but did not consider it relevant in evaluating the applicant's forced recruitment attempts. Thereby, this fact was not ignored. Rather, the Board simply chose to give it little weight. Similarly, the Board also did consider the applicant's explanation of why he was being targeted by gang members, but reasonably chose to give this explanation little weight because of a lack of objective evidence indicating that gangs in El Salvador actually recruit disabled individuals.

[11] As a result, the applicant has failed to prove that the Board based its decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the evidence before it and it is not the role of this Court to reweigh the evidence.

ii. *Did the Board err in its assessment of state protection, basing its decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the evidence before it?*

[12] The applicant argues that the Board erred in its assessment of state protection, failing to properly consider the applicant's testimony and the documentary evidence he submitted. The applicant claims the Board failed to consider his two attempts at seeking police protection: on two occasions, the police refused to assist him. In addition, the Board failed to consider the documentary evidence indicating that the justice system in El Salvador is unable to protect victims of crime and human rights violations within the country.

[13] The respondent asserts that the applicant is merely seeking to have the evidence reweighed, which is not a function of this Court. The applicant failed to rebut the presumption of state protection, as explained by the Board in its decision. The mere fact that the authorities do not

always succeed in protecting citizens does not mean that state protection is unavailable: a local failure of law enforcement does not establish the unavailability of state protection. A lack of confidence in the police authorities in El Salvador was insufficient to rebut the presumption of state protection. Contrary to the applicant's assertions, the Board did not err in failing to consider the evidence before it, having acknowledged the existence of crime and corruption in El Salvador. Rather, the applicant failed to seek out state protection, while this protection is not perfect. The Board is presumed to have considered all of the evidence and the Board even explicitly referred to the evidence identified by the applicant in the present application as being ignored. While some of the documentary evidence outlines the problems in El Salvador, this does not rebut the presumption of availability of state protection within the country. Since it is not a function of this Court to reweigh the evidence that was before the Board, the present application must be dismissed.

[14] The respondent is right and properly outlines the principles of state protection, while the applicant is in reality asking this Court to reweigh the evidence that was before the Board. The Board considered the evidence before it, explicitly addressing the evidence relied on by the applicant and his attempts at seeking state protection, while it did not have the obligation to refer to every piece of evidence before it (*Velasquez*, above at para 21). The applicant even admits that the Board acknowledged the evidence he relied on to prove the inadequacy of state protection in El Salvador at paragraph 11 of his Further Memorandum of Argument when he states that "[t]he Board went on to described several points made at the hearing by counsel for the Applicant with respect to the lack of adequate state protection in El Salvador".

[15] The Board acknowledged the existence of criminality and corruption in El Salvador, outlining the gang activity within the country. However, as in *Canada (Minister of Employment and Immigration) v. Villafranca* (1992), 99 D.LR. (4th) 334, 150 N.R. 232 (F.C.A.), cited in *Kadenko v. Minister of Citizenship and Immigration* (1996), 143 D.L.R. (4th) 532, 206 N.R. 272 (F.C.A.) at para 4 [*Kadenko*]: "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. . . ." (see also *Velasquez*, above at para 17). Thus, it was reasonable for the Board to conclude that the applicant failed to seek out police protection, having only sought assistance twice when various mechanisms were in place in El Salvador to fight gang activity, as illustrated by the documentary evidence (see *Kadenko*, above at para 5; *Hussain v. Minister of Citizenship and Immigration*, 2003 FCT 406 at para 7; and *Paniagua*, above at para 8). Every case turns to its own facts and it was not unreasonable for the Board to conclude that the applicant could have done more, considering the documentary evidence (*Rovirosa*, above at para 9). As stated by Justice Michel Shore in *Ayala*, above at para 28*:*

> . . . The existence of documents suggesting that the situation in El Salvador is not perfect, is not, by itself, clear and convincing confirmation that state protection is unavailable, especially when there are numerous other documents indicating that state protection is available. . . .

[16] As in *Ayala*, above, the Board reasonably relied on extensive documentary evidence indicating that the government of El Salvador is taking active steps in combating gang-related activity (at paragraph 20).

[17] With regards to the applicant's submissions, I would add, as argued by the respondent, that the murder rate in El Salvador "tells us nothing about what the state can and/or will do if

approached by the [applicant] for protection" (*Jimenez*, above at para 34). Once again, I repeat that the Board did not ignore the existence of corruption, criminality and gangs in El Salvador. Therefore, as stated by Justice James Russell, even though "[h]omicides may be epidemic in El Salvador and the authorities may be finding it difficult to improve the figures, […] this does not mean they cannot or will not protect potential refugees who ask for protection" (*Jimenez*, at para 34). Therefore, even though the evidence relied on by the applicant indicates that the conditions in El Salvador are far from ideal, "this is not enough to ground a claim for protection" (*Jimenez*, at para 39).

[18] Moreover, the Board did not solely rely on the government's efforts to fight crime, it considered the effectiveness of these various mechanisms (compare with *Beharry v. Minister of Citizenship and Immigration*, 2011 FC 111 at para 9).

[19] Furthermore, the Board did not merely rely on the documentary evidence to conclude that state protection would be forthcoming in El Salvador. Rather, it emphasized the applicant's failure to seek state protection, having only made two attempts at reporting the alleged incidents causing him to fear returning to El Salvador. The applicant relies on various cases where state protection was found adequate, considering the applicants could not identify their attackers, whereas he claims to have been able to identify his attackers, while the police did nothing. However, let it be reminded once again that "[e]very case turns on its own unique facts" (*Rovirosa*, above at para 9).

[20] The applicant did not seek further assistance because he did not believe the police would assist him, having previously refused to take his complaints twice. However, various alternatives

exist in El Salvador, as evinced by the country documentation and an evaluation of the adequacy of state protection cannot solely be based on the applicant's subjective belief (*Castaneda v. Minister of Citizenship and Immigration*, 2010 FC 393 at para 26 [*Castaneda*]). As explained by Justice Richard Boivin in *Castaneda*:

> [30] If a refugee protection claimant failed to take all available measures to seek state protection, the Court finds that it is not enough to rely solely on documentary evidence of flaws in the justice system of the refugee protection claimant's country of origin (*Zamorano; Cortes v. Canada (M.C.I.)*, 2006 FC 1487, 154 A.C.W.S. (3d) 450). The applicant did not want to go to the authorities out of fear, and he did not approach higher authorities or other agencies. By not taking measures to seek state protection before making a claim for refugee protection, the applicant failed to rebut the presumption of state protection (*Cordova v. Canada (M.C.I.)*, 2009 FC 309, [2009] F.C.J. No. 620 (QL)).

[21] The Board's above-mentioned findings were within its jurisdiction and deference is owed. The applicant is once again asking this Court to reweigh the evidence that was before the Board, which is not within my jurisdiction. Considering that the Board's decision and findings are reasonable, falling "within the range of possible acceptable outcomes which are justified in facts and law" (*Dunsmuir*, above at para 47), this Court's intervention is unwarranted.

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[22] For these reasons, the application for judicial review is dismissed.

[23] I agree with counsel for the parties that this is not a matter for certification.

JUDGMENT

The application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada dated July 14, 2011 is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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