Federal Court  Cour fédérale

Date: 20120629

Docket: IMM-6355-11

Citation: 2012 FC 837

Ottawa, Ontario, June 29, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JUAN SEBASTIAN BETANCOURT
GLORIA PATRICIA VELASQUEZ, and
JOSE ERNESTO BETANCOURT VALENCIA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND MULTICULTURALISM

Respondent

REASONS FOR JUDGEMENT AND JUDGMENT

[1] The applicants, Jose, Gloria, and their son Juan, are a Colombian family. Another son, Jairo, remains in Colombia, while a third son resides in Saskatoon. The applicants seek to set aside the decision of the Refugee Protection Division denying their claims for protection.

[2] The applicants raise three issues which they submit ought to result in their application being allowed:

(i) Issues of interpretation and translation;

(ii) Alleged errors in making the credibility finding relating to Jose's evidence; and

(iii) An alleged error in relying on the applicants' delay in claiming protection evidencing lack of subjective fear.

[3] For the reasons that follow, I am not persuaded that the applicants have established either that there was an error of law made or that the decision was unreasonable; accordingly, this application must be dismissed.

Background

[4] The Decision indicates that the following was the basis asserted by the applicants for their claim for protection. Jose owned a small store in Colombia in which he sold clothing, food, and various household items. He was approached by the *Fuerzas Armadas Revolutionarias de Colombia* [FARC] which demanded that he pay a monthly fee – a "vaccine" to the FARC. Failure to pay or to contact the authorities would result in the death or harming of him and his family. He paid for two years but then due to a downturn in his business he was unable to make the full payments.

[5] In 2003, his house was shot at, presumably by the FARC. He was told by his extortionists that they knew that his son, Jairo, was studying at the military academy in Bogota

and that they viewed anyone who cooperated with the government as a traitor. Jose asked his son to leave school and return home, which he did.

[6] The FARC then indicated that they wanted Jairo to join them. When this demand was made, Jairo was away from home and Jose contacted him and told him not to return. Jose and Gloria went to Bogota where they met with Jairo and they reported what had happened to the office of the Attorney General. Jairo hid while his parents returned home.

[7] Three months later the applicants fled to a neighbouring town but were contacted again by the FARC which repeated that they wanted Jairo to join them. Jose was also told that he had disrespected the FARC and that he would be punished. Jose fled to work with his nephew in another town. Three days later he and his nephew were accosted by three men from the FARC who beat them and again demanded that Jairo join them. Jose returned to his family and a few weeks later his nephew was murdered. There was a note in his pocket from the FARC indicating that they were responsible.

[8] A few moths later the applicants moved again and subsequently fled Colombia having obtained visas for the United States. Jairo remains in hiding in Colombia.

[9] The applicants arrived in the US in September 2009 intending to come to Canada where they had a son living in Saskatoon. They were turned back at the border as they did not have a visa to enter Canada. They returned to the US but did not seek asylum as they had intended to

claim in Canada. A friend drove them across the border into Canada at Fort Erie in November 2009 where they claimed protection. They later travelled to Saskatoon to be with their other son.

Interpretation

[10] The applicants, who are Spanish speaking, submit that they were denied a fair hearing and that their rights under section 14 of the *Charter* to "the assistance of an interpreter" were violated.

[11] The facts relied upon by the applicants in support of this submission are found in the affidavit of Mr. Rosales, a Spanish speaking law student who volunteers with the Community Legal Assistance Services of Saskatoon Inner City Inc., which has been providing legal representation for the applicants. He was present during the Board hearing but not as their counsel.

[12] The issues are whether the quality of translation was such that the rights of the applicants were breached and whether they delayed in bringing forward their allegations of incompetent translation.

[13] I accept that the applicants had no way of knowing whether the translation being provided was competent as they speak no English. I also accept that their counsel was not in a position to know whether the translation was competent unless so advised by a Spanish speaker.

[14] The affidavit of Mr. Rosales is based on his recollection of the translation made at the hearing. He provides two specific examples of what he asserts were errors made in translation and states that "[t]o identify other problems with the interpretation, I would need to review a transcript of the hearing." I do not in any way question the sincerity of the evidence given by Mr. Rosales; however, while this evidence may be sufficient on a leave application, on a judicial review of a decision where translation is at issue, the Court expects an affidavit from a qualified person who has reviewed the audio recording of the proceeding and compared it with the official transcript.

[15] It must be kept in mind when alleging incompetent interpretation that there is a presumption that the translation provided at a Board hearing is accurate. A translator in a Board proceeding is accredited and takes an oath or provides a declaration to "interpret accurately any statements made" during the hearing. Where it is asserted that the quality of the translation was inaccurate, precise information is required; not merely recollection or information from notes taken during the course of the hearing. The Court has no meaningful way to weigh the evidence of an affiant relying on such notes and recollection against the translation provided at the hearing.

[16] In any event, the knowledge of the applicants and their counsel concerning these alleged translation difficulties raise a different concern – whether they raised the competence of the translation at the first opportunity.

[17] Mr. Rosales attests that during a break in the hearing he "mentioned to counsel that there were some inaccuracies with the translation but did not discuss the nature or extent of those problems." He further attests that "after the decision and reasons for the decision had been received … I discussed the nature and extent of the problems with the translation with counsel."

[18] The respondent notes that following a recess, counsel for the applicants at the outset of his submissions to the Board makes the following statement:

> I note also, in passing, that one of the issues that you indicated as being relevant in all of these matters was credibility. And in a situation, when, of course, part of the evaluation credibility involves the use of interpreters, I would submit that sometimes that makes assessments of credibility a little bit more difficult. And it's not in any way to slight the translation that's going on or otherwise [emphasis added].

[19] In this case there was at least one person who was aware during the hearing that there were alleged issues with the quality of interpretation being provided. It was raised, perhaps not in detail, with counsel during a break and not raised again until after the decision had been rendered. In my view, whenever counsel is informed during a hearing that there are "some inaccuracies with the translation" during a hearing, he or she must take immediate steps to assess whether they are such that the *Charter* rights of the client are being breached. A failure to do so in most circumstances will operate as a bar to raising the concerns later. Further, if as Mr. Rosales now says in his affidavit he was aware of these concerns but did not raise them in any detail until the decision was rendered, one must ask why they were not raised in detail earlier with counsel. If, as is now stated, there was a perception at the hearing that there were material errors in translation, that allegation must be raised prior to the decision being reached.

Otherwise, as was submitted by the respondent in this case, the applicants are hedging their bets and holding this issue in reserve should it be unfavourable.

[20] I have reviewed the two specific circumstances where the applicants allege an error was made in translation. I cannot conclude that the errors, even if made, were material. The Board based its credibility findings on at least five contradictions, inconsistencies, and omissions as well as a number of implausibility findings. The errors, even if accepted as such, do not overcome the weight of the evidence relied upon by the Board in making its decision. Accordingly, this submission fails.

Credibility Findings

[21] The applicants raise several findings of the Board that went to credibility which they submit were in error. I have carefully reviewed each against the Personal Information Form (PIF) narratives, the testimony before the Board, and the affidavits filed in this proceeding. I find that any errors made were insignificant and did not affect the result the Board reached. The real issue here is whether the finding the Board made concerning credibility was one that could reasonably be made on the evidence before it. In my view, it was.

[22] I will not deal with all of the submissions made in writing and at the hearing; I choose to focus on the following which illustrates the basis of the finding of inconsistent evidence tendered by the applicants.

[23] The applicants raise as an issue the finding of the Board that there was a contradiction in the applicants' evidence as to whether the vaccines payments were stopped, paid in part or whether Jose negotiated a lower rate. The applicants assert that they never stopped the payments but continued to make them at a lower rate, the balance accumulating as a debt to the FARC. However, I agree with the respondent that the focus of the Board was on the discrepancy between the PIF in which Jose states that "I stopped [the payments] and things became very dangerous for me" with his evidence at the hearing (and in his affidavit he now files) which tells a different story.

[24] There were other inconsistencies noted between his statement at the hearing that he had no trouble with the FARC when living in San Vincente del Caguan and his PIF wherein he states that he received several threatening phone calls from the FARC.

[25] There were also questions relating to his evidence regarding his son Jairo. I agree with the Board that it was illogical that Jose would ask him to leave the military academy, where he presumably was safe, and return home where the FARC was threatening Jose and his family.

[26] It is also incredible that the applicants would choose to leave Jairo behind in Colombia when it is asserted that he is a target of the FARC. Apparently, he has been able to remain in hiding since 2003 while the FARC was able to track and follow the other family members throughout Colombia requiring them to flee the country.

[27] The Board's finding on credibility was reasonable.

Delay

[28] I accept that the applicants failed to claim in the US because they wished to claim in Canada where a son resides. The Board's finding that this showed a lack of subjective fear is questionable. However, the determinative finding in this case was not the lack of subjective fear; rather, it was the credibility finding made by the Board. That is reflected in the decision wherein the Board writes that it is "left with insufficient credible evidence on which to come to a positive finding." Thus, even if the Board erred, as alleged, it would not affect the determination made by the Board and would not have impacted the final result.

Conclusion

[29] This application is dismissed. Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is denied and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6355-11
STYLE OF CAUSE:	JUAN SEBASTIAN BETANCOURT ET AL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND MULTICULTURALISM
PLACE OF HEARING:	Saskatoon, Saskatchewan
DATE OF HEARING:	June 13 2012
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
DATED:	June 29, 2012

APPEARANCES:

Nicholas Blenkinsop	FOR THE APPLICANTS
Natasha Crooks	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Community Legal Assistance Services for Saskatoon Inner City Inc. (CLASSIC) Saskatoon, Saskatchewan	FOR THE APPLICANTS
MYLES J. KIRVAN Deputy Attorney General of Canada Saskatoon, Saskatchewan	FOR THE RESPONDENT