Federal Court  Cour fédérale

Date: 20120531

Docket: IMM-8526-11

Citation: 2012 FC 673

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, May 31, 2012

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

RAIKO MIGUEL PORTUONDO VASALLO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a 23-year-old Cuban citizen. He arrived in Canada with a temporary exit visa as a member of a dance troupe invited to perform shows in Canada. At the end of the trip, he failed to leave the country with the other members of the group and claimed refugee protection.

[2] He based his claim on allegations of persecution and on a risk of return because of his race (he is black) and his sexual orientation. He also alleged that he faces risks of persecution by reason

of imputed politician opinion because he refused to re-enter Cuba, that he no longer has his passport (that the dance troupe manager refused to give it back to him) and that he overstayed his exit visa, with the result that he does not have the travel documents required to re-enter Cuba without suffering serious consequences.

[3] The Refugee Protection Division of the Immigration and Refugee Board (Board) analyzed the applicant's claim for protection pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) and rejected it. The applicant is seeking judicial review of that decision.

[4] For the following reasons, the application is dismissed.

I. Board's decision

[5] The applicant alleged that he was the subject of discrimination based on his race.

[6] He first described an incident where he was unable to be admitted into a specialized music school when he was nine years old because his spot, and those of two other black Cubans, was purportedly given to military children in exchange for money. The Board found that the evidence did not establish that that incident was related to the applicant's race, but rather to corruption.

[7] The applicant also stated that he was the subject of identity checks by the police on several occasions. The Board acknowledged that those checks could have been motivated, in part, by racial considerations, but it found that the evidence did not demonstrate that the applicant suffered any

serious hardship as a result of those incidents or that he was the victim of discrimination amounting to persecution.

[8] The applicant also testified as to the discrimination he was the victim of by reason of his homosexuality. He indicated that he and a group of friends, most of whom were homosexuals and transvestites, were, on a few occasions, evicted from a public park by police on the pretext of preventing prostitution. The Board did not view such incidents as persecution, that is, a serious infringement of a fundamental right, or repeated discrimination amounting to persecution.

[9] The Board also noted that the applicant alleged that he fears persecution by reason of political opinion because he does not like Cuba's political and economic system. The Board did not accept this allegation and, furthermore, noted that the applicant had stated that [TRANSLATION] "he was not a politician" and had never expressed political views.

[10] The Board also considered the fear of return based on the expiry of the applicant's exit visa. The Board noted, on this point, that counsel for the applicant had submitted documentary evidence in support of that allegation after the hearing. The Board found that the evidence submitted did not demonstrate, on a balance of probabilities, a risk of return under subsection 97(1) of the IRPA. The Board noted that the documentary evidence indicated that citizens must be properly documented when attempting return to the island, but that nothing in the evidence or in the testimony of the applicant indicated that he could not obtain the documents required to return to Cuba, or what consequences he might face if he were to return despite the expiry of his exit visa.

II. Standard of review

[11] It is well established that the issue of the existence of a risk of persecution or exposure to a risk to life or to a risk of cruel and unusual treatment or punishment in the event of return to the country of origin is a question of mixed fact and law reviewable on the standard of reasonableness (*Sagharichi v Canada (Minister of Employment and Immigration)* (1993), 42 ACWS (3d) 494, 182 NR 398 (CA) (*Sagharichi*); *Liang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 450 at paragraphs 16 and 17, 166 ACWS (3d) 950 (*Liang*); *Tetik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1240 at paragraph 25, 86 Imm LR (3d) 154). The Court must not substitute its own assessment of the evidence and the circumstances of the matter for that of the Board. The Court's analysis must focus on justification and transparency within the Board's decision-making process and on whether the decision falls within a range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190).

III. Analysis

[12] The applicant argues that the Board improperly assessed the evidence and that it erred by finding that he was not a victim of persecution or discrimination amounting to persecution. The applicant also contends that the Board erred by failing to consider the cumulative effect of the incidents and the treatment he was subjected to. In his opinion, the Board analyzed the incidents he mentioned in isolation rather than from a global and cumulative perspective.

[13] The applicant also criticizes the Board for not recognizing that, because his exit visa expired and because he refused to re-enter the country, he would be considered a political opponent and would be subject to imprisonment. With respect to the evidence on prison conditions in Cuba, the

Board had to consider whether the applicant would face excessive punishment. The applicant relies on *Alfaro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 912, 1 Imm LR (4th) 57 (*Alfaro*).

[14] With respect, I consider the Board's findings reasonable in respect of the evidence submitted by the applicant.

[15] The concept of persecution is not defined in the IRPA. In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at paragraph 63 (available on CanLII), the Supreme Court defined the concept of persecution as a "sustained or systemic violation of basic human rights demonstrative of a failure of state protection." In order to constitute persecution, the treatments in question must be serious and repetitive or systematic. In *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at paragraph 71 (available on CanLII), the Supreme Court further discussed the concept of persecution and stated the following: "[t]he essential question is whether the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way." There is therefore a need to consider whether one of the applicant's basic rights was violated and then verify whether the violation was repetitive or systematic.

[16] In this case, I consider the findings drawn by the Board from the evidence to be reasonable. In my opinion, the incidents mentioned by the applicant, whether in isolation or in combination, do not amount to persecution or discriminatory treatment amounting to persecution. Those incidents did not threaten the applicant's basic rights in a fundamental way and did not have the repetitive or systematic nature required to constitute persecution.

[17] The Federal Court of Appeal in *Sagharichi*, above, explained the difficulty in drawing the line between the concepts of discrimination and harassment:

> It is true that the dividing line between persecution and discrimination or harassment is difficult to establish, the more so since, in the refugee law context, it has been found that discrimination may very well be seen as amounting to persecution. It is true also that the identification of persecution behind incidents of discrimination or harassment is not purely a question of fact but a mixed question of law and fact, legal concepts being involved. It remains, however, that, in all cases, it is for the Board to draw the conclusion in a particular factual context by proceeding with a careful analysis of the evidence adduced and a proper balancing of the various elements contained therein, and the intervention of this Court is not warranted unless the conclusion reached appears to be capricious or unreasonable.

[18] The Board's analysis was sufficiently thorough to determine that it considered all of the incidents reported by the applicant and it was reasonable to find that those incidents did not amount to persecution.

[19] The applicant maintains that the Board failed to analyze whether he would be at risk of persecution or would face a risk to his life or a risk of cruel and unusual treatment or punishment because he overstayed his exit visa and that he would face imprisonment upon his return.

[20] In *Valentin v Canada (Minister of Employment and Immigration)* (1991), [1991] 3 FC 390 (available on QL) (CA), the Federal Court of Appeal found that a person's fear of a criminal sanction for exiting his or her country illegally or overstaying the stay authorized by his or her exit visa is not, in itself, a reasonable basis for fear of persecution. Justice Marceau stated the following at paragraphs 8 and 9 of the decision:

> **8** I will say, first, that while in humanitarian terms I am very much inclined to sympathize with the idea of granting refugee

> status to everyone who faces criminal sanctions such as those imposed by section 109 of the Czech Criminal Code, in practical and legal terms the idea seems to me to be illogical and without any rational basis. Neither the international Convention nor our Act, which is based on it, as I understand it, had in mind the protection of people who, having been subjected to no persecution to date, themselves created a cause to fear persecution by freely, of their own accord and with no reason, making themselves liable to punishment for violating a criminal law of general application. I would add, with due respect for the very widely held contrary opinion, that the idea does not appear to me even to be supported by the fact that the transgression was motivated by some dissatisfaction of a political nature (on this point, see, inter alia. Goodwin-Gill, op. cit., p. 32 et seq.: James C. Hathaway, The Law of Refugee Status, p. 40 et seq.), because it seems to me, first, that an isolated sentence can only in very exceptional cases satisfy the element of repetition and relentlessness found at the heart of persecution (cf. *Rajudeen v. M.E.I.*. 55 N.R. 129), but particularly because the direct relationship that is required between the sentence incurred and imposed and the offender's political opinion does not exist.
>
> **9** In my opinion, a provision such as section 109 of the Czech Criminal Code can have a determining effect on the granting of refugee status only In an appropriate context. This will occur in cases where the provision, either in itself or in the manner in which it is applied, is likely to add to the series of discriminatory measures to which a claimant has been subjected for a reason provided in the Convention, so that persecution may be found in the general way in which he is treated by his country. . . . [Emphasis added.]

[21] These principles have been applied by the Court repeatedly (*Donboli v Canada (Minister of Citizenship and Immigration)*, 2003 FC 883, 124 ACWS (3d) 1126 (*Dunboli*); *Galvez v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1690, 135 ACWS (3d) 912; *Zandi v Canada (Minister of Citizenship and Immigration)*, 2004 FC 411, 129 ACWS (3d) 1187, *Perez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 833 (available on CanLII) (*Perez*); *Rosales v Canada (Minister of Citizenship and Immigration)*, 2012 FC 323 (available on QL)).

[22] In *Donboli*, above, Justice Dawson, now of the Federal Court of Appeal, indicated that, in some circumstances, it was necessary to further analyze and examine whether punishment for an illegal exit from a country could constitute a reasonable basis for a fear of persecution. She stated the following:

> **4** In *Valentin v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 390 the Federal Court of Appeal held that punishment for an illegal exit from a country is not in itself a basis for a well-founded fear of persecution, when the punishment arises out of a law of general application. However, where a proper evidentiary basis exists it is necessary to consider whether excessive or extra-judicial punishment for an illegal exit could constitute a reasonable basis for a well-founded fear of persecution. See: *Castaneda v. Canada (Minister of Employment and Immigration)* (1993), 69 F.T.R. 133 (T.D.); *Moslim v. Canada (Secretary of State)*, [1994] F.C.J. No. 184 (T.D.).

[23] Justice Rennie applied these principles in *Alfaro*, above. He found that the circumstances of the case required that the Board proceed with a prospective analysis of the problems that would await the applicant upon his return to Cuba to determine whether he would face excessive punishment. It is important to note that, in that case, several elements and circumstances that occurred before the applicant's resident permit expired appear to indicate that the applicant would clearly be perceived as a political opponent and that he would have serious difficulty when he returned to Cuba.

[24] The situation in this case is completely different and is more akin to the circumstances in *Perez*, above. In that case, the applicant raised, among other things, that she would suffer persecution and would be imprisoned upon her return to Cuba for overstaying the authorized stay period. That applicant based her claims on the same documentary evidence as the applicant

submitted in this case and, such as the present, the female applicant did not try to renew her exit visa. Justice Snider stated the following:

> **12** The CTR contains some documentary evidence related to Cuban travel requirements (see, in particular, CUB101911E, Responses to Information Requests (RIRs), CTR, 107-109). An exit visa can be renewed beyond the initial period of issuance for up to 11 months. However, beyond 11 months, the Cuban citizen must request a special permit to resume residence, which must be issued by the Cuban diplomatic mission abroad. A 2005 Report of Human Rights Watch indicates that, according to Article 215 of Cuba's Criminal Code, "[i]ndividuals who enter Cuba 'without completing legal formalities or immigration requirements' risk one to three years of imprisonment" (CTR, 225). However, the HRW Report contains no explanation of the law or examples of its application. Nor did the Applicant submit a copy of the relevant legislative provision or any other documentary evidence showing that persons in her situation have been imprisoned upon their return.
>
> **13** The Federal Court of Appeal decision in *Valentin*, above, is directly applicable to this application. *Valentin* bars self-induced refugee status. It starts from the premise that a claimant has a valid exit visa. It then bars the claimant from overstaying the visa and relying on the self-created overstay as a ground of persecution. In this case, the Applicant held a valid exit visa. She failed to renew her permit, as she could have done. She cannot rely on self-created overstay as a ground of persecution. *Valentin* has been consistently followed in this Court where the facts are similar to those before me; see for example, *Jassi v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 356, [2010] F.C.J No. 412 (QL).
>
> **14** The jurisprudence is to a similar effect in the context of a s. 97 claim for protection. In *Zandi v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 411, [2004] F.C.J. No. 503 (QL), Justice Kelen considered the situation of an Iranian who defected to Canada while here for an athletic competition. In considering whether the claimant could claim protection on the basis that he would be punished for defecting on his return to Iran, Justice Kelen stated as follows:
>
> > To paraphrase the Federal Court of Appeal in *Valentin*, *supra*, a defector cannot gain legal status in Canada under IRPA by creating a "need for protection" under section 97 of IRPA by freely, of their own accord and with no reason, making themselves liable to punishment by

> violating a law of general application in their home country about complying with exit visas, i.e. returning.
>
> **15** In short, the jurisprudence is clear that the Applicant, who failed to renew her valid exit visa, cannot rely on the possibility of punishment under Cuba's Criminal Code as grounds for protection under s. 96 or s. 97.
>
> **16** Moreover, it is far from clear that the Applicant will be charged and convicted under the applicable law. The documentary evidence demonstrates that the Applicant could still apply for a special re-entry permit to return to Cuba. There is no evidence that the Applicant would, with such a permit, be the subject of prosecution under Cuban laws. The documentary evidence contains not a single reference to a similarly-situated person being imprisoned pursuant to this law. On the facts before me, the allegation of imprisonment is mere speculation. There is simply insufficient evidence for me to find that the Applicant's fear of imprisonment is well-founded. [Emphasis added.]

[25] Those principles clearly can be transposed to this case. First, the applicant did not try to renew his exit visa. We therefore do not know if he would be able to regularize his situation and obtain adequate travel documents. Furthermore, the evidence does not make it possible to assess, short of speculation, the possible consequences for the applicant if he were to return to Cuba without valid travel documents. Nothing in the evidence makes it possible to assess how the law is applied and it is therefore impossible to determine whether the applicant actually risks being accused, convicted and imprisoned. Finally, contrary to the facts in *Alfaro*, the applicant did not experience any problems with the Cuban authorities that would suggest that he would be mistreated upon his return. The dance troupe manager's refusal to give the applicant back his passport is insufficient on this point. The applicant failed to demonstrate a personalized risk.

[26] For all of these reasons, I am of the opinion that the Board's findings are reasonable and that there is no basis for the Court to intervene.

[27] Neither party proposed a question for certification and there is no question for certification arising.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question is certified.

"Marie-Josée Bédard"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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