Federal Court  Cour fédérale

Date: 20140501

Docket: IMM-6516-13

Citation: 2014 FC 406

Ottawa, Ontario, May 1, 2014

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

JUAN ANDRES ALCIVAR LEON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of a decision made by the Refugee Protection Division of the Immigration and Refugee Board (the Board) on July 24, 2012 wherein the Board rejected the applicant's application for refugee protection. For the following reasons, the application for judicial review is granted.

1. Factual Background

[2] Juan Andres Alcivar Leon (the applicant) is a citizen of Ecuador. The applicant is a gay, transsexual and HIV positive person.

[3] The applicant entered Canada on May 5, 2012. He claimed refugee protection some time thereafter and submitted his Personal Information Form (PIF) on July 19, 2012. The Board rejected his refugee claim on July 24, 2012.

[4] The Board accepted as credible the events that occurred in the applicant's personal history. The Board noted that the applicant alleged fearing persecution from family members in Nobol and found that the applicant had an internal flight alternative (IFA) in the city of Quito.

[5] The Board found that some of the applicant's documents suggest the existence of clinics "treating" homosexuality everywhere in Ecuador. However, the Board concluded that the documents showed that there was some state action that resulted in several of the clinics shutting down. The Board noted that the record did not suggest that someone was attempting to put the applicant in such a clinic. Other documents mention that there is opposition to gay rights and that the Ecuadorian president would veto any gender identity laws. However, the same documents mention that Ecuador was the first country in the Americas to grant sexual orientation protected status. Other documents confirm that the Ecuadorian constitution protects the right to decide one's sexual orientation and the right not to be discriminated against on the basis of sexual orientation. Even if there is evidence that gays, lesbians and transgender people still suffer discrimination in the country, there is no evidence of societal violence against persons suffering

from HIV/AIDS. The Board therefore found that there was not enough convincing evidence to establish that the risk of persecution for the applicant in Quito would put him "within the definition" (Board's decision at 4).

[6] The Board also found that, even if the applicant claims that he would be refused medication as a homosexual or a person suffering from HIV, the documentary evidence clearly states that any such refusal would be unconstitutional in Ecuador and nothing suggests that it would happen in fact.

[7] The issues raised by this application are the following:

A. Did the Board apply the correct test for refugee protection?

B. Did the Board reasonably conclude that there was an IFA in Quito?

2. Standard of Review

[8] The correctness standard applies to the first question and the Court "will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, [2008] 1 SCR 190 [*Dunsmuir*]). The second question is a question of mixed fact and law that is reviewable under the reasonableness standard (*Kayumba v Canada (Minister of Citizenship and Immigration)*, 2010 FC 138 at paras 12-13, [2010] FCJ No 163 (QL); *Dunsmuir*, above at paras 51, 62).

[9] When reviewing decisions under the standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making

process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above at para 47).

3. Analysis

[10] The Board examined the documents before it and found that the applicant did not adduce sufficient evidence to convince it, on a balance of probabilities, that it would be objectively unreasonable for the applicant to seek refuge in Quito. The Court is satisfied that, in reaching its finding, the Board did not impose on the applicant a higher onus than the one required by the established jurisprudence on IFAs (Tribunal record, pp 4, 5 and 6; *Rasaratnam v Canada (Minister of Employment and Immigration)* (CA), [1992] 1 FC 706, [1991] FCJ No 1256 at para 6 (QL)).

[11] At hearing before this Court, the applicant emphasized that the psychological reports, more particularly, that of Dr. Pilowsky were not properly considered by the Board. The applicant argued that the facts of this case are identical to the facts in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35 [*Cepeda-Gutierrez*]). However, the Court does not understand the decision in *Cepeda-Gutierrez* to stand for the proposition that a psychological report must always be fully analyzed by the Board in its reasons as seems to suggest the applicant. Rather, Justice Evans (as he then was) decided in *Cepeda-Gutierrez*, above, that the Board had failed to mention some evidence and it could be inferred that the Board's decision had been made 'without regard to it'. Such is not the case here. The Board did not err in its treatment of the psychological reports and the Court cannot accept

the applicant's argument that the Board failed to "grasp the significance of the psychological reports".

[12] Indeed, the two (2) psychological reports relied upon by the applicant are specifically mentioned in the Board's decision and although their content is not explicitly acknowledged, it is accepted by the Board, which found the applicant's story and fears credible. The Court is satisfied that no reviewable error was committed by the Board on that point.

[13] Finally the Court must consider if the Board erred in its treatment of another key piece of evidence.

[14] This evidence relates to passages, referred to by the Board, of the US Department of State Country Reports on Human Rights Practices for 2012 (Applicant's Record at 200-202; also available online at: <http://www.state.gov/j/drl/rls/hrrpt/2012humanrightsreport/index.htm>) stating that Ecuador provides homosexuals and people infected with HIV/AIDS with constitutional guarantees against discrimination. However, the Board did not mention the following passage: " […] NGOs reported that individuals with HIV/AIDS believed they experienced discrimination, including on issues such as equal employment opportunities and access to appropriate health care" (Applicant's Record at 202), [Emphasis added].

[15] This failure to address the remainder of the paragraph is amplified because the Board considered the issue of access to health care an important aspect of the IFA issue: "if you were not able to get medical attention because of your identity as a gay person, a trans-sexual person, or a person who is HIV positive then arguably that could bring [the applicant] back within the

definition, because [his] membership in the particular social group would put [him] at particular risk" (Board's decision, p 5).

[16] The issue of the applicant's access to medication, as an HIV positive person, adds a particular vulnerability to his situation. Yet, the Board omitted to discuss a passage from the US Department of State report pointing in the other direction and suggesting that NGO's reported that homosexuals and HIV positive persons believe they suffer discrimination in accessing appropriate health care.

[17] Given the Board's failure to address the full passage of the documentary evidence regarding the issue of health care which was considered critical by the Board, the Court is inclined in these circumstances, "to infer from the silence that the [the Board] made an erroneous finding of fact 'without regard to the evidence'". The applicant's argument based on *Cepeda-Gutierrez*, above, with respect to the Board's failure to address a key piece of evidence in its entirety, finds application with respect to this issue.

[18] For these reasons, the Court's intervention is warranted and the application for judicial review will be granted.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is granted;

2. The matter is referred back to a different member of the Refugee Protection Division of the Immigration and Refugee Board for redetermination;

3. No serious question of general importance is certified.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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