Date: 20060216

Docket: IMM-928-05

Citation: 2006 FC 207

Ottawa, Ontario, February 16, 2006

PRESENT: The Honourable Mr. Justice von Finckenstein

BETWEEN:

MERCIBETH ROJAS ALARCON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant is a citizen of Venezuela. She was an employee of the Venezuelan Petroleum Company ("PDVSA") and she participated in the December 2002 national strike in Venezuela. She was detained between December 24 and December 28, 2002 by two members of the Venezuelan National Guard and a representative of PDVSA. They wanted her to provide her access code to the company's computer network; she refused. Two days after being released, she was threatened over the phone to keep quiet.

[2] On January 31, 2003, her name was included in the newspaper as being one of many PDVSA employees fired because of her involvement in the strike. She was told by other employers that they could not employ fired PDVSA employees and so she was unable to find further employment in Venezuela.

[3] On November 2, 2003, she was pulled over by members of the Venezuelan National Guard. They took her to a camp of the Armed Revolutionary Forces of Colombia (FARC) because she was opposed the revolution of President Chavez's government. She was sexually abused by two FARC members. Once she was released, she decided to flee Venezuela. She entered Canada on December 19, 2003 via the United States.

[4] The Immigration and Refugee Board (the "Board") stated the determinative issue to be the claimant's dual citizenship. The Board referred to the documentary evidence stating that children with at least one Colombian parent have an inherent right to Colombian nationality. Therefore, the Board found the Applicant is a national of Colombia and Venezuela. As a Colombian, the Board found that she had nothing to fear from the FARC, even though the FARC had murdered the Applicant's uncle and cousin in Colombia in 2002, because the documentary evidence indicated that she did not fit the profile of persons targeted by the FARC, ELN or other guerrilla groups in Colombia.

ISSUES

[5] The Applicant essentially argued three points before me, namely:

1. Did the Board err in deciding that Colombia was a country of reference?

2. Did the Board err in its failure to address whether Colombia could provide adequate state protection?

3. Was there a breach of natural justice due to the former Counsel's material omissions or conduct? And if so, should the new evidence found in the Applicant's affidavit be admitted?

STANDARD OF REVIEW

[6] The Federal Court of Appeal set out the standard of review in *Williams* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FCA 126 at paragraphs 17 and 18:

> The finding by the Board that the respondent could obtain Ugandan citizenship as a matter of course upon renouncing his Rwandan citizenship is a finding of fact which cannot be interfered with by the applications judge unless it amounts to a palpable and overriding error. The finding is not challenged by the respondent and, in any event, Pinard J. did not disturb it.
>
> Whether the existence of an option to seek protection in Uganda is a valid cause for the denial of the refugee status is a question which requires the interpretation of section 96 of the IRPA. This is a question of law. It is well settled that on questions of law of such nature, the standard of review is correctness.

[7] It follows from the above quote that the standard of review regarding whether or not Colombia was a country of reference is patent unreasonableness.

ANALYSIS

Issue 1:

[8] The Federal Court of Appeal in *Williams, supra* made the following pronouncement at paragraph 22:

> I fully endorse the reasons for judgment of Rothstein J., and in particular the following passage at page 77:
>
> > The condition of not having a country of nationality must be one that is beyond the power of the applicant to control.
>
> The true test, in my view, is the following: if it is within the control of the applicant to acquire the citizenship of a country with respect to which he has no well-founded fear of persecution, the claim for refugee status will be denied. While words such as "acquisition of citizenship in a non-

> discretionary manner" or "by mere formalities" have been used, the test is better phrased in terms of "power within the control of the applicant" for it encompasses all sorts of situations, it prevents the introduction of a practice of "country shopping" which is incompatible with the "surrogate" dimension of international refugee protection recognized in Ward and it is not restricted, contrary to what counsel for the respondent has suggested, to mere technicalities such as filing appropriate documents. This "control" test also reflects the notion which is transparent in the definition of a refugee that the "unwillingness" of an applicant to take steps required from him to gain state protection is fatal to his refugee claim unless that unwillingness results from the very fear of persecution itself. Paragraph 106 of the Handbook on Procedures and Criteria for Determining Refugee Status emphasizes the point that whenever "available, national protection takes precedence over international protection," and the Supreme Court of Canada, in Ward, observed, at p. 752, that "[w]hen available, home state protection is a claimant's sole option."

[9] Here the documentary evidence stated:

> Children with at least one Columbian parent have an inherent right to Columbian nationality.
>
> (T.R. page 624)

[10] The Applicant produced no evidence as to why this was untrue, or why it was not in her control to acquire Colombian nationality. In her testimony before the Board, she advised that her parents had dual citizenship. (see T.R. page 671). Accordingly, there was nothing unreasonable in the Board's finding that Colombia was a country of reference. Where an applicant claims refugee status and is a national of two countries, he must make out his claim for refugee status against both countries (see *Tit* v. *Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 556).

Issue 2:

[11] The Applicant alleges that the Board failed to make a finding of state protection. The Board here made a finding that she has no justified fear of prosecution in Colombia, as the Applicant does not have the profile of the type of people persecuted by FARC. Given that finding, there was no need to address state protection. The observations of Justice Blais in *Muotoh* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 1599 at paragraph 13 can be equally applied here:

> In its finding that the applicant is not a refugee, nor a person in need of protection, the Board determined that the applicant is not at risk Further, as previously mentioned, the applicant did not bring new evidence to prove that he would be at risk. Without this new evidence it is unnecessary to

> determine if state protection would be available. The applicant does not need state protection if he is not at risk. As such, the failure of the officer to evaluate the possibility of state protection does not breach the principles of natural justice.

Issue 3:

[12] The Applicant argues as follows: her former counsel mishandled the issue of country of reference. She is seeking to introduce her affidavit which reflects a conversation she had with the Colombian consul in Toronto. The said consul informed the Applicant that her parents (born in Colombia) must have had to renounce their Colombian citizenship to acquire Venezuelan citizenship. For the applicant to regain her Colombian citizenship, her parents would first have to apply to the local Colombian consul to regain their Colombian citizenship. Once they have regained it, the Applicant could then apply for Colombian citizenship.

[13] The jurisprudence of this court is quite clear that new evidence will not be allowed in judicial review hearings (see *Charlery (Designated Representative) v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 993 at para 16; *Dokmajian* v. *Canada (Minister of Citizenship and Immigration)* (2003), 25 Imm. L.R. (3d) 48, 2003 FCT 85; *Lemiecha (Litigation guardian of) v. Canada (Minister of Employment and Immigration)* (1993), 72 F.T.R. 49, [1993] F.C.J. No 1333).

[14] An exception exists in cases where procedural fairness is alleged. In *McFadyen* v. *Canada (Attorney General)*, [2005] F.C.J. No. 1817, 2005 FCA 360 Justice Desjardins stated at paragraph 15:

> The principle that evidence outside the administrative record, that is outside the record before the tribunal, can be considered where the grounds for review are any of the various forms of jurisdictional error is well-established: as Denning L.J. noted in an early English leading case, "[w]hen certiorari is granted on the ground of want of jurisdiction, or bias, or fraud, affidavit evidence is not only admissible, but it is, as a rule, necessary" (R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw, [1952] All E.R. 122 at 133 (C.A.)). This principle has been approved by the Supreme Court of Canada on numerous occasions: see, for example, Canadian Union of Public Employees, Local 301 v. Montreal (City), [1997] 1 S.C.R. 793 at para. 86; R. v. Miller, [1985] 2 S.C.R. 613 at paras. 15 and 23-26; Cardinal v. Kent Institution, [1985] 2 S.C.R. 643 at para. 13. A breach of procedural fairness is also one of the forms of jurisdictional error to which this principle applies: see Chen v. Canada (Minister of Citizenship and Immigration) (1999), 240 N.R. 376, (1999) 174 D.L.R. (4th) 165 at para. 10 (F.C.A.); Robert W. Macaulay & James L.H. Sprague, Practice and Procedure Before Administrative Tribunals, looseleaf, vol. 3 (Toronto: Thomson Carswell, 1988) at 28-56.2ff; Donald J.M. Brown & The Hon. John M. Evans, Judicial Review of Administrative Action, looseleaf, vol. 2 (Toronto: Canvasback Publishing, 2004) at 6-62ff.

[15] This of course raises the question: Was there a breach of natural justice due to the former Counsel's material omissions or conduct?

[16] An examination of the record reveals that the issue of the Applicant's possible Colombian nationality was raised by the Applicant herself as she introduced a document attesting to her mother acquiring Venezuelan citizenship. (see T.R. page 76 which is a page from the Official Gazette of the Republic of Venezuela).

[17] The issue of Colombian citizenship and the inherent right of children was discussed at the first hearing before the Board on October 26, 2004. The following exchange took place:

> **A.** Thank you. Madam, in evidence before me are documents relating to your interview with an Immigration officer concerning your refugee protection claim on December 19th, 2003.
>
> **PRESIDING MEMBER**: Now, Mr. Lesarge, I'm referring to Exhibit R-1, page 13.
>
> **BY THE BOARD (PRESIDING MEMBER):**
>
> **Q**. This document indicates that both your mother and your deceased father were born in Columbia, is that correct?
> **A**. Yes, that's correct.
> **Q**. Having been born in Columbia, were your parents also citizens of Columbia?
> **A**. My mother became naturalized and my father obtained his nationality after he died.
> **Q**. And what nationality is that?

A. Venezuelan.
Q. Because your parents were born in Columbia, would they also not be citizens of Columbia?
A. Yes, that's correct. They have duel nationality, duel citizenship.
Q. Madam, the documentary evidence before me indicates, as you stated, Venezuela and Columbia permit duel citizenship.

PRESIDING MEMBER: Mr. Lesarge, I'm referring to Exhibit R-2, Columbia Items G-1 and G-2.

BY THE BOARD (PRESIDING MEMBER):
Q. This documentary evidence also indicates that children with at least one Columbian parent have an inherent right to Columbian citizenship or nationality. Given this documentary evidence, would it be possible for you to live in Columbia without serious harm?
A. It would not be possible for me to live in Columbia because the reason why I'm fleeing is partly because of the FARC and I fear that they would find me more easily in Columbia. Furthermore, I would further endanger my family such as my uncles and my cousins.

(T.R. page 671)

[18] As is evident from this exchange, the whole issue of the inherent right of children of Colombian parents to acquire Colombian citizenship was raised in October 2004. When the hearing resumed in November, no evidence was produced to repudiate the documentary evidence cited by the Board. The only references to Colombia as a place of asylum were the following question and answer:

Q. Madam, the first day of the hearing I had asked you some questions about Columbia. Would it be possible for you to relocate to Columbia and live in the capital city of Bogotá and live there without fear of serious harm at the hands of the FARC?

A. That would be impossible. If they can locate me in Venezuela, it will be easier in Columbia. As soon as I arrive at the Bogotá airport or any other Port of Entry, they will locate me.

(T.R. page 688)

and the final submission by counsel

> We already know that the FARC have caused incredible havoc in Columbia. Her family personally had a taste of that with the death of her uncle and cousin. I submit to the Member that if one has been targeted by FARC, clearly Columbia would be about the last place in the world that one would pick as a safe country alternative.
>
> (T.R. page 694)

[19] For the Applicant to succeed in establishing that her counsel was incompetent, the Applicant has to establish a precise factual foundation for her contention. Justice Denault provided a good summary of the law regarding the incompetence of counsel in *Shirwa* v. *Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 51 at paragraphs 11 and 12:

> While each of the foregoing cases involve a different type of misconduct on the part of counsel, it seems clear that the incompetence of counsel in the context of a refugee hearing provides grounds for review of the tribunal's decision on the basis of a breach of natural justice. The criteria for reviewing such a decision are not as clear, but it is possible to derive a number of principles from these cases. In a situation where through no fault of the applicant the effect of counsel's misconduct is to completely deny the applicant the opportunity of a hearing, a reviewable breach of fundamental justice has occurred (Mathon).
>
> In other circumstances where a hearing does occur, the decision can only be reviewed in "extraordinary circumstances", where there is sufficient evidence to establish the "exact dimensions of the problem" and where the review is based on a "precise factual foundation." These latter limitations are necessary, in my opinion, to heed the concerns expressed by Justices MacGuigan and Rothstein that general dissatisfaction with the quality of representation freely chosen by the applicant should not provide grounds for judicial review of a negative decision. However, where the incompetence or negligence of the applicant's representative is sufficiently specific and clearly supported by the evidence such negligence or incompetence is inherently prejudicial to the applicant and will warrant overturning the decision, notwithstanding the lack of bad faith or absence of a failure to do anything on the part of the tribunal.

[20] I fail to see how given the circumstances of this case, it can be said the Applicant's former counsel was incompetent. First of all, there is no evidence that the Board's finding was wrong regarding the inherent rights of children of Colombian parents. This evidence regarding the inherent rights of children came from a Research Report of the Immigration and Refugee Board based on advice from the Legal Office of the Ministry of Foreign Affairs in Colombia (the "Research Report") (see T.R. page 624).

[21] The Applicant now seeks to admit an affidavit reciting a telephone conversation (backed by an e-mail message) with a Colombian consul in Toronto speculating on Venezuelan law and the steps her parents went through to acquire Venezuelan citizenship. Even if one would ignore the obvious issue of hearsay, the evidence regarding Venezuelan law is built on slender foundations. No evidence is provided as to the qualification of the Colombian consul regarding Venezuelan law. Secondly, the e-mail itself speaks about her parents and not the Applicant. It reads:

> In Marcibeth's case, her parents were forced to renounce to their Colombian nationality to be able to obtain their Venezuelan Citizenship. This means that in order to apply to get back their nationality they first have to get back their nationality and then they [sic] can register her at the civil registry. Her

> mother can do it in a Colombian Consulate in Venezuela and once she gets form for her ID Card, she can be either registered in Venezuela or Bogotá.
>
> Sincerely yours,
>
> Catalina Chaux
> Consul General

(A.R. page 35)

The e-mail is silent on either the inherent rights of children of Colombian parents, or about the process the Applicant has to go through to acquire Colombian citizenship.

[22] Given that the former Counsel's client had admitted that her parents had dual citizenship, and faced with the evidence of the Research Report, it can hardly be said that Applicant's former counsel was incompetent for not verifying that information with the Colombian consul. Apart from that, it is far from evident that the e-mail of the Colombian consul properly reflects Venezuelan law.

[23] I thus see no reason to admit the new affidavit evidence of the applicant. Given that the Applicant failed on all three points put forward, this application cannot succeed.

ORDER

THIS COURT ORDERS that this application is dismissed.

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-928-05
STYLE OF CAUSE:	MERCIBETH ROJAS ALARCON **Applicant** And M.C.I. **Respondent**
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REASONS BY:	Justice K. von Finckenstein
DATED:	February 16, 2006

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