Date: 20061101

Docket: P IMM-1206-06

Citation: 2006 FC 1325

Ottawa, Ontario, November 1, 2006

Present: The Honourable Mr. Justice Blanchard

BETWEEN:

VICTOR DANIEL DIAZ SAMANO

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

1. Introduction

[1] This is an application for judicial review of a decision by the Immigration and Refugee Board, Refugee Protection Division (the Board), dated February 23, 2006, determining that the applicant, Victor Daniel Diaz Samano, was not a refugee as defined under section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (hereinafter IRPA) or a person in need of protection under section 97 of the IRPA.

[2] The applicant is asking this Court to set aside the Board's decision and to refer the matter for rehearing before a differently constituted panel.

2. Background

[3] The applicant is a citizen of Mexico. He arrived in Canada on June 13, 2005, and filed a refugee claim on June 21, 2005. His claim is based on a fear of being subjected to a danger to his life or to cruel and unusual treatment or punishment if he were to return to his native country. The hearing of the claim took place on December 22, 2005, before the Board.

[4] The applicant, who worked as a truck driver with the company Autotransportes El Bisonte said that when he was returning from a delivery in October 2004, he saw people in the company parking lot handling suspicious parcels. Before leaving there, his boss, Luis Zuniga, allegedly told him not to tell anyone or that he could have an accident. Mr. Zuniga then asked him on two occasions to transport drugs. Met with the first refusal, Mr. Zuniga warned him that something could happen to him. On the second refusal, he threatened to kill him unless he changed his mind. After these events, Mr. Zuniga allegedly gave the applicant's truck to another driver and the applicant worked as an alternate driver for several weeks before resigning in November 2004.

[5] The applicant says that since November 2004 he has been intercepted several times by members of the judicial police for inspection while he was driving his truck. During these inspections, the police officers allegedly asked him to leave town and told him that because he had refused to participate in the drug trafficking he would have to die. These threats continued

for over eight months and ended when the applicant left Mexico. He allegedly decided to leave his country after a police officer approached him in May 2005 when he was picking up his son at school and told him that something could very well happen to his child.

[6] The threats to the applicant's life and physical integrity continued, so the applicant says, after he left Mexico. His ex-wife received a call in November 2005 from a person who wanted to know where the applicant could be found. That same person told her to tell the applicant that it would be better if he were never to return to the country. On December 18, 2005, individuals also forced their way into the applicant's ex-wife's home and asked her where they could find him. On that occasion, they threatened her and his son. The applicant's ex-wife reported this incident to the authorities.

3. Impugned decision

[7] On February 23, 2006, the Board decided that the applicant was not a refugee under section 96 of the IRPA or a person in need of protection under section 97 of the IRPA.

[8] The evidence before the Board in essence consists of the applicant's testimony, the Personal Information Form (PIF), personal documents and documents on conditions in Mexico as regards corruption and drug trafficking, *inter alia*.

[9] The Board decided that the applicant was not credible with regard to central elements of his claim and that he had not established through clear and convincing evidence that his country was unable to protect him.

[10] In its decision, the Board justified its determination to the effect that the claim was not credible by the existence of certain inconsistencies in the applicant's testimony, in the Personal Information Form (PIF) and in the background information. The Board identified the following inconsistencies:

- The applicant testified that he had worked as an assistant plumber and electrician with his brother from December 2004 to May 2005. Yet, this employment was not mentioned in his PIF. The applicant's explanation to the effect that this omission was due to the fact that it was casual employment was deemed to be unsatisfactory;
- The applicant stated in the background Personal Information Form that he had worked for the transport company "El Bisonte" from August 1998 to May 2005; while in his Personal Information Form (PIF) and in his testimony, he alleged rather that he worked from July 2004 to November 2004. It dismissed the applicant's explanation to the effect that these discrepancies were due to translation errors;
- The applicant failed to mention in his testimony that he had received death threats from the judicial police.

[11] The Board also identified a certain number of implausibilities in the applicant's story. Hence, it found the following elements of the applicant's story lacked credibility:

- The applicant did not report the police officers because he feared for his life and for the life of his son, but his son is still in Mexico and a long time had elapsed between the applicant's departure and the beginning of the threats;

- In explaining why the persecuting officers threatened him in May 2005 after he left his job in November 2004, the applicant stated on the one hand that his persecuting officers were working with the State of Mexico but on the other hand that the officers were afraid that the applicant would report them to the authorities;
- The applicant's wife reported the death threats against her son to the authorities.

[12] Finally, the Board considered that the applicant had not established clear and convincing evidence that the State of Mexico was unable to protect him.

4. Issues

[13] The issues the Federal Court must decide in this matter can be summarized as follows:

A. Did the Board make one or more reviewable errors in assessing the applicant's credibility?

B. Did the Board make a reviewable error in determining that the applicant had not provided clear and convincing evidence that Mexico was unable to protect him?

5. The standard of review

[14] The first of these issues is one of credibility. The case law has consistently held that the appropriate standard for such determinations is that of patent unreasonableness. See: *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. 732, *R.K.L. v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. 162, and *Khaira v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 62. A decision is patently unreasonable when, under the

circumstances, it is clearly abusive, patently unfair, contrary to common sense or unfounded in fact or in law.

[15] The second issue to be decided by this Court is whether the State was able to protect the applicant. In *Chaves v. Canada (Minister of Citizenship and Immigration),* [2005] F.C.J. 232, Madam Justice Danièle Tremblay-Lamer of this Court, following a pragmatic and functional analysis to determine the appropriate standard of review, determined that this issue was a question of mixed fact and law, subject to the reasonableness *simpliciter* standard. I adopt the analysis and the standard applied by my colleague in *Chaves* for the purposes of this review on the second issue. A decision will be deemed unreasonable when it has no basis in law or in fact that can stand up to a somewhat probing examination (*Director of Investigation and Research v. Southam Inc.*, [1997] 1 S.C.R. 748).

6. Analysis

A. *Did the Board make one or more reviewable errors in assessing the applicant's credibility?*

[16] The applicant submitted that the Board erred in its assessment of the applicant's credibility. He also argued that the Board assigned undue importance to certain omissions and inconsistencies that appeared in the PIF, in the background information and in the applicant's testimony. He contended that the fact that the applicant was not able to precisely indicate to the immigration officer the dates of his previous jobs is not incredible given the stress that the applicants suffer in these kinds of interviews. He reiterated his explanation to the effect that he had not declared the job he worked with his brother when he arrived because it was informal

employment. With regard to the omission about his statement before the Board that members of the judicial police threatened to kill him, he claimed that it was simply an oversight typical when giving oral testimony. With regard to the Court's negative finding regarding the fact that he had not reported his persecutors to the authorities, he submitted that he had not mentioned all of the reasons why he had not sought protection from his country. He added that the panel should not have found that his explanations for the continuing threats after he resigned negatively affected his credibility, since the only persons in a position to respond to this question were his persecutors. Finally, he submitted that the Board should not have implied that he was responsible for the acts of his ex-wife, i.e. reporting to the authorities.

[17] The respondent argued rather that the applicant does not explain in what way the panel's findings are unreasonable in light of the evidence. He added that the panel had enough evidence before it to determine that the applicant was not credible and that he did not have a subjective fear of persecution.

[18] There is a well-established principle in the case law to the effect that an administrative tribunal is in an advantageous position for assessing the credibility of witnesses, which implies that the Court must show deference when reviewing findings of this kind. This principle is also expressed in *R.K.L. v. Canada (Minister of Citizenship and Immigration),* [2003] F.C.J. No. 162, at paragraphs 7 to 9:

> The determination of an applicant's credibility is the heartland of the Board's jurisdiction. This Court has found that the Board has well-established expertise in the determination of questions of fact, particularly in the evaluation of the credibility and the subjective fear of persecution of an applicant . . .

> Moreover, it has been recognized and confirmed that, with respect to credibility and assessment of evidence, this Court may not substitute its decision for that of the Board when the applicant has failed to prove that the Board's decision was based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it . . .
>
> Normally, the Board is entitled to conclude that an applicant is not credible because of implausibilities in his or her evidence as long as its inferences are not unreasonable and its reasons are set out in "clear and unmistakable terms" . . .
>
> [Footnotes omitted.]

[19] Despite all of the deference that this Court must show, it has the power to intervene on issues of credibility when it has patently unreasonable errors before it. It has already been decided, as Mr. Justice Luc Martineau pointed out in *R.K.L.*, that when the Board focuses on minute details of the testimony so as to neglect the essence of the testimony or affect the applicant's credibility based on minor inconsistencies between the background information, the PIF and the testimony, it amounts to a patently unreasonable error.

[20] It is clear from the Board's decision that the finding on the applicant's credibility rests in part on the inconsistencies of his testimony, the background information and the PIF. Yet, some of the identified inconsistencies (jobs with his brother, date employment ended at El Bisonte) involve minor details and factors in the applicant's story and ought not to strip him of all credibility.

[21] These errors, had they been the sole basis for the Board's determination, could have opened the door to the review of the decision. The decision, however, was based on other findings. First, according to the transcript of hearing, the applicant did not volunteer that he had received death threats when he testified. Rather, he stated that the police simply asked him to

leave town. The panel had to ask him twice what the police officers had said to him at the time of the inspections before he stated that they had also threatened to kill him. The Board's determination to the effect that this inconsistency affects the applicant's credibility does not seem to be patently unreasonable given the importance of this element in his refugee claim. Second, the Board had identified some aspects of the applicant's story implausible, such as the reason for which the applicant had been threatened by the judicial police and the fact that the applicant's ex-wife had reported to the authorities the threats that she and her son had received. The Court must dismiss the applicant's argument to the effect that the Board's determinations on this part of his story are unfounded since they make him responsible for the acts of third parties. In fact, it is not unreasonable to find that the acts of third parties influence the plausibility of a story. Further, the panel found that the applicant's conduct was not consistent with his allegations of fear. The applicant, alleging that he had been threatened since the beginning of 2005, would not have waited until June of the same year to leave, with his son still living in Mexico. This finding is not unreasonable. Finally the applicant failed to mention in his PIF that work colleagues who filed reports were killed by drug traffickers and that this was the reason, *inter alia*, that he did not report his boss, Mr. Zuniga. Under the circumstances, this is an important omission enabling the Board to make a negative finding on the applicant's credibility.

[22] Therefore, there is nothing that suggests that the Board's findings on the applicant's credibility are unreasonable to the point that this Court would be justified to intervene considering the appropriate standard of review in this case. On that point, Mr. Justice William Ian Binnie pointed out moreover in *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at paragraph 164, that while the standard of

correctness implies that there is only one proper answer, the standard of patent unreasonableness could have many appropriate answers, but not the one reached by the decision maker.

[23] In my opinion, Board did not err in assessing the applicant's credibility. Because of this determination, the Board was entitled to dismiss the applicant's refugee claim.

B. *Did the Board make a reviewable error in determining that the applicant had not provided clear and convincing evidence that Mexico was unable to protect him?*

[24] Considering the findings on the applicant's credibility and the dismissal of his refugee claim, the Board did not have to examine the issue of State protection, which explains why its remarks were brief. To the extent that there is no basis for reviewing the Board's decision on that point, this Court, like the Board, need not decide the second issue.

7. Conclusion

[25] For these reasons, the application for judicial review will therefore be dismissed.

[26] The parties did not propose a serious question of general importance as contemplated under paragraph 74(*d*) of the IRPA. No question will therefore be certified.

FEDERAL COURT

SOLICITORS OF RECORD

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