Date: 20070706

Docket: IMM-2151-06

Citation: 2007 FC 721

Ottawa, Ontario, July 6, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

GISELLE ACOSTA RAMIREZ

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Protection Board (the Board), dated March 30, 2006, which determined that the applicant was neither a Convention refugee nor a person in need of protection.

[2] The applicant requests that the Board's decision be set aside and that the matter be remitted for redetermination by a differently constituted panel of the Board.

Background

[3] The applicant, Giselle Acosta Ramirez, is a twenty-seven year old citizen of Cuba. She claimed refugee protection in Canada alleging a fear of persecution on the basis of her political opinion.

[4] The applicant explained the circumstances leading to her claim for refugee protection in the narrative section of her Personal Information Form (PIF). The applicant did not support the Communist party and resisted becoming a member until her third year of medical school, when it became clear that she would have to join the party in order to become a doctor. She was pressured to join the party by influential faculty members and other doctors. The applicant was forced to donate blood in order to cleanse herself from her previous refusal to join the party. The applicant deliberately lost her membership card almost as soon as she received it. She regularly attended Communist marches and meetings in order to avoid trouble from Cuban authorities. The applicant was not required to produce her membership card in order to attend these events, as the party kept records identifying party members. Her mother is a member of the Communist party. While not noted in her PIF, she described her father as a political dissident during the refugee hearing.

[5] The applicant experienced continuous sexual harassment during her studies and as a doctor. She was forced to join a medical mission to Guatemala from March 2004 until March 2005. The applicant feared for her life during this mission. She worked alone and was subjected to dangerous conditions. The applicant was scheduled to attend a similar mission to Venezuela in September 2005. She began thinking about escaping Cuba, which she described as an "Alcatraz jail", in January 2005. She formulated a plan to escape Cuba with the help of Franco Bello, a Canadian friend whom she had met while he was visiting Cuba. Bello found a health-related conference in Montreal which she could attend. The applicant obtained permission from the Cuban government to enter Canada on a thirty-day visa in order to attend the international conference on sexology. The applicant was part of a group of seventeen Cubans who attended the conference. Her intention was to attend the conference and escape from the group in order to seek asylum in Canada.

[6] The applicant arrived in Canada on July 10, 2005, and made a claim for refugee protection on July 26, 2005. Since her arrival in Canada, the applicant has been informed that Cuban authorities have contacted her parents and questioned them about her whereabouts. The authorities have also tried to convince her parents to persuade her to return to Cuba. The applicant fears being charged with desertion by Cuban authorities and imprisoned. She also fears losing her right to work as a doctor. The applicant's refugee hearing was held on March 24, 2006, and by decision dated March 30, 2006, the Board found that the applicant was neither a Convention refugee nor a person in need of protection, since she had not demonstrated a well-founded fear of persecution or other harm. This is the judicial review of the Board's decision.

Board's Reasons

[7] The Board found that the applicant was neither a Convention refugee nor a person in need of protection. The applicant's testimony did not generally appear embellished. However, the Board found that she had embellished her story about her father's status as a dissident figure, a detail which had not been mentioned in her Port of Entry (POE) notes or PIF. The applicant's evidence suggested that she was not perceived as a dissident in Cuba. The applicant was well-educated, a doctor and was sent to serve in Guatemala. She had also become a member of the Communist party, as was expected of Cuban doctors. Documentary evidence indicated that Communist party membership was a prerequisite for professional advancement in Cuba.

[8] The applicant was asked why she did not return to Cuba when she knew that she would be penalized for remaining in Canada. The applicant responded that while she opposed the Cuban system, she did not show her opposition in public. The Board cited *Valentin* v. *Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 390, (1991) 167 N.R. 1, in which the Federal Court of Appeal held that refugee legislation was not meant to protect people, who having been subjected to no persecution, created a fear of persecution by making themselves liable to punishment for having violated a law of general application. This principle also applied in cases where the transgression was motivated by political dissatisfaction. Additional jurisprudence established that *Valentin* applied to refugee claims involving Cuban citizens, and to section 97 claims.

[9] The applicant's POE notes, PIF, and testimony indicated that she would: be considered a dissident by the Cuban government; lose her right to work as a doctor; be imprisoned for desertion; and be beaten. She also indicated that her parents had been contacted by Cuban authorities. The Board found it unclear whether Cuban authorities would treat the applicant as a political dissident or a young person lured away by career opportunities. The documentary evidence suggested that there was no fixed punishment for overstaying abroad. Refugee proceedings in Canada are private and there was no indication that Cuban authorities knew of her claim. The Board concluded that the applicant had never been perceived as a political dissident. It was noted that the applicant had been sent to Canada for the conference, which suggested that Cuban authorities had confidence in her. The Board found no evidence that the applicant's parents had suffered reprisals for her desertion. Her mother was a Communist and had not been fired from her teaching position. However, she had been asked to persuade the applicant to return to Cuba. The applicant gave details during the hearing about her father which had not been included in her POE notes or PIF. She testified that he belonged to an opposition group, prepared food for political prisoners, distributed medicine to fellow dissidents and was under government surveillance. There was no evidence that he had been arrested for engaging in these activities. The evidence suggested that Cuban authorities did not perceive the applicant as a dissident and had not arrested her parents for her desertion.

[10] While documentary evidence established that outspoken dissidents were mistreated in Cuba, the applicant was not similarly situated, in that she was a member of the Communist party. The Board noted a report which indicated that the United States Committee for Refugees (USCR) routinely monitored returned migrants to Cuba and had not reported any mistreatment of such

individuals. Had evidence of the mistreatment of returned refugees been available, the Board reasoned that counsel would have produced it.

[11] In questioning the applicant, counsel falsely stated that her PIF indicated that she feared being raped upon return to Cuba. During the hearing, the applicant responded in the affirmative when asked by counsel whether she feared being raped in detention. There was no evidence that female prisoners in Cuba were being raped. The Board noted that counsel asked the applicant leading questions which provoked self-serving and unreliable answers. The Board concluded that the applicant was unable to demonstrate that she was at risk, having regard to her own circumstances or those of similarly situated persons. The Board applied the Gender Guidelines, but did not find the applicant trustworthy on important elements of her claim.

Issues

[12] The applicant submitted the following issues for consideration:

1. Did the Board err in finding that the applicant was not seen as a dissident in Cuba?
2. Did the Board err in finding that the applicant was fearful of returning to Cuba only for the reason of being liable to punishment for violating a criminal law of general application?
3. Did the Board err in categorizing the applicant's case as one of an "overstay" and the applicant's fear of the consequences of that "overstay"?
4. Did the Board err in applying the *Valentin* decision to the applicant's case?

5. Did the Board err in finding that there is no fixed punishment for overstaying abroad but that the authorities decide each case on its own?
6. Did the Board misapply the law in interpreting the migration agreements signed between Cuba and the United States and their application to the applicant's facts?
7. Did the Board err in finding that the documentary evidence dealing with mistreatment does not include people in the applicant's situation?
8. Did the Board err in its statement that it is difficult to be clear about how Cuban authorities would treat the applicant, including whether they would see her as an opponent of the Cuban system, in light of its other findings?
9. Did the Board err in finding that there is no evidence that her parents have suffered any reprisals for her failure to return in time?
10. Did the Board err in regard to the evidence of the applicant's fear of being raped in detention and the documentary evidence about this subject?
11. Did the Board repeatedly and unfairly interrupt the applicant in her testimony not giving her a full opportunity to present her case?

[13] I would simplify the issues as follows:

1. Did the Board err in finding that the applicant did not have a well-founded fear of persecution?
2. Did the Board err in its consideration of the evidence?
3. Did the Board breach the principles of procedural fairness?

Applicant's Submissions

[14] The applicant submitted that the Board erred in finding that she was not perceived as a dissident in Cuba. It was submitted that when a claimant swears to the truth of certain allegations, this creates a presumption that the allegations are true, unless there is reason to doubt them (see *Maldonado* v. *Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302, (1979) 31 N.R. 34 (C.A.)). The applicant noted that the Board found her to be credible overall. Her PIF narrative indicated that she had to donate blood as a cleansing of her initial refusal to join the Communist party and was criticized for not being an aggressive member. It was submitted that this was evidence of her perception as a dissident. The Board stated that it was difficult to be clear about whether Cuban authorities would perceive the applicant as a young person lured away by career opportunities or as an opponent to the Cuban system. It was submitted that this choice of wording by the Board suggested that the finding that she was not perceived as a dissident was not definitive.

[15] The applicant submitted that the Board erred in finding that she only feared punishment for having violated a law of general application. The Port of Entry (POE) notes indicated that she feared being considered a "contra revolutionary person", being imprisoned and losing her right to work as a doctor. Her PIF narrative indicated that she feared persecution on the basis of her political opinion. She also feared being forced to participate in a dangerous medical mission to Venezuela in September 2005.

[16] The applicant submitted that the Board committed a patently unreasonable error of fact in categorizing her case as an “overstay”. The applicant went to Canada as a member of a Cuban delegation in order to attend a conference. The applicant submitted that the Cuban government would consider her an opponent for having abandoned the delegation. The applicant noted Cuban legislation which stated that any employee fulfilling a mission in a foreign country who abandons their mission or fails to return to Cuba when required, would be deprived of their freedom for three to eight years. It was submitted that in light of this legislation, the Board also erred in finding that there was no fixed penalty for overstaying abroad.

[17] The applicant submitted that the Board erred in applying *Valentin* (see above) and *De Corcho Herrerra* v. *Canada (Minister of Employment and Immigration)* (1993), 70 F.T.R. 253, to her case. It was submitted that this jurisprudence did not deal with the unique case of Cuban doctors, who are required to demonstrate their allegiance to Castro. The applicant noted that the Board failed to consider documentary evidence which dealt with the plight of Cuban doctors. It was submitted that the Board erred by ignoring relevant testimony and persuasive corroborative documentary evidence (see *Padilla* v. *Canada (Minister of Employment and Immigration)* (1991), 13 Imm.L.R. (2d) 1, 160 N.R. 156 (F.C.A.)). The applicant submitted that the Board erred in failing to address documentary evidence concerning the mistreatment of similarly situated persons. It was submitted that the Board should consider the totality of the evidence when making findings of fact and should not ignore relevant evidence (see *Tung* v. *Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.)).

[18] The Board noted documentary evidence which indicated that the USCR did not report incidents of mistreatment of refugees who returned to Cuba. It was submitted that the findings in this report were only relevant to refugees covered by the migratory agreement between the United States and Cuba. The report therefore did not apply to the applicant. The applicant submitted that the Board therefore misapplied the law to the facts of her case.

[19] The applicant submitted that the Board erred in finding that there was no evidence that her parents had suffered reprisals for her failure to return to Cuba. It was submitted that the Board overlooked the applicant's detailed testimony regarding her parents' current situation. The applicant submitted that the Board overlooked the reality that a person does not have to be fired or jailed to be persecuted. It was submitted that the Board failed to appreciate why she had to receive emails written in code, in light of documentary evidence stating that the Cuban government intercepted emails. The applicant submitted that the Board erred in finding that there was no evidence of women being raped in Cuban prisons. It was submitted that the Board also erred in finding that the applicant had not presented evidence that she feared being raped. During the hearing, the applicant answered positively when asked by counsel whether she feared being sexually abused in jailed.

[20] The applicant submitted that the Board unfairly interrupted the applicant while she was testifying and failed to provide her with an opportunity to present her case. It was submitted that the Board limited the evidence that it was prepared to listen to on the pretext that it was familiar with country conditions in Cuba.

Respondent's Submissions

[21] The respondent submitted that whether the Board applied the correct legal test to the applicant's situation was a matter of mixed fact and law, and was reviewable on the standard of reasonableness (see *Holway* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 309). It was submitted that the standard of review applicable to issues of credibility and the relevance of evidence was patent unreasonableness, as these questions were factual in nature (see *Aguebor* v. *Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (FCA)).

[22] The respondent submitted that defectors - claimants who triggered their own need for protection - were generally not *bona fide* refugees (see *Valentin*). This principle had been upheld in cases involving Cuban defectors (see *De Corcho Herrerra*). In *Dykon* v. *Canada (Minister of Employment and Immigration)* (1994), 87 F.T.R. 98, 25 Imm.L.R. (2d) 193 (F.C.T.D.), the Court held that *Valentin* only applied where persecution had not taken place prior to exit. The Court also confirmed that the principles in *Valentin* applied to claims brought under section 97 of IRPA (see *Zandi* v. *Canada (Minister of Citizenship and Immigration)* (2004), 35 Imm.L.R. (3d) 273, 2004 FC 411). In *Cheng* v. *Canada (Minister of Citizenship and Immigration)* 2002 FCT 211, Justice Pinard held that the Board had not erred in finding that Chinese exit laws, which carried a penalty of five years of imprisonment, did not amount to persecution.

[23] The respondent submitted that applicant's claim for protection was not *bona fide*. The applicant triggered her fear of punishment under Cuban exit laws by arranging to attend a

conference in Canada and leaving Cuba. It was submitted that the principles in *Valentin* apply to preclude her claim. The respondent submitted that the applicant's fears stemmed directly from her violation of exit laws (i.e.: losing the right to work as a doctor, punishment for desertion, imprisonment, being beaten). The respondent submitted that the applicant's case was not special simply because she was a doctor. The respondent noted that thousands of civil servants defected from Cuba daily.

[24] The respondent submitted that the Board did not commit a material error in assessing the applicant's treatment on return to Cuba. The applicant pointed to a provision in the Cuban Penal Code which provided that employees who abandoned a mission in a foreign country would be deprived of their freedom for three to eight years. However, the document which cited this provision went on to comment that information about its use could not be found, since thousands of government employees, including doctors, deserted the Cuban regime while overseas. The respondent submitted that it was not clear that the desertion provision would apply to the applicant, since she was attending a conference, and was not on a foreign mission.

[25] Should the law apply to the applicant, evidence about the extent to which it was enforced was equivocal. Should the applicant be tried under these laws, the Federal Court had held that a five year penalty for violating exit laws did not constitute persecution. In addition, the Federal Court of Appeal had expressed doubt as to whether a sentence for violating exit laws constituted persecution (see *Valentin*). Should the Board have erred in failing to mention these laws, it was submitted that the error was immaterial since the applicant did not have a *bona fide* claim for protection.

[26] The respondent submitted that the Board considered and weighed the evidence appropriately. The Federal Court has held that the Board is not required to refer to every piece of evidence that is contrary to its finding (see *Cepeda-Gutierrez* v. *Canada (Minister of Citizenship and Immigration)* (1998) 157 F.T.R. 35 (F.C.T.D.)). It was submitted that the Board is presumed to have weighed all of the evidence unless the contrary is shown (see *Florea* v. *Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.) (QL)). The Board noted that the USCR did not report incidents of the mistreatment of returned migrants, and it was submitted this statement did not necessarily refer only to migrants who returned to Cuba from the United States. The respondent submitted that there was no documentary evidence confirming mistreatment of returning migrants in the applicant's situation. The respondent submitted that the documentary evidence relied upon by the applicant referred to doctors who had deserted medical missions and denounced the Cuban government, and was not relevant to the applicant's situation.

[27] The respondent submitted that the Board did not err in assessing the impact of the applicant's defection on her parents. The respondent submitted that there was no necessary correlation between the fact that Cuba monitored emails and possible harm to the applicant's parents. It was submitted that in any event, it was the likelihood of persecution to the applicant, not her parents, which was material in this case. The documentary evidence suggested that Cuban authorities punished defectors by denying exit permits to their family for five years, a penalty which did not engage sections 96 or 97 of IRPA.

Applicant's Reply

[28] The applicant challenged the respondent's submission that she had no basis for fearing returning to Cuba, other than having violated a law of general application. It was noted that her PIF narrative referred to Cuba as an "Alcatraz jail" and that she had devised a plan to escape the country. The applicant submitted that this supported her argument that there were other reasons for her fear. It was submitted that even if she had not violated the exit laws, she still would have lost her right to work as a doctor, since she failed to provide the minimum period of work in exchange of receiving her medical education. The applicant submitted that the finding in *Dykon* supported her case, since the Court stated that *Valentin* only applied in cases where persecution had not taken place prior to exit. It was submitted that the applicant had provided clear evidence of the persecution she faced while in Cuba.

[29] The applicant submitted that she did not try to introduce evidence regarding her father's status as a dissident during the refugee hearing. The Board asked questions about her father and she simply answered them.

Analysis and Decision

Standard of Review

[30] The standard of review applicable to the Board's finding that the applicant did not demonstrate an objectively well-founded fear of persecution is patent unreasonableness (see *Singh*

v. *Canada (Minister of Citizenship and Immigration)* (1999), 173 F.T.R. 280, 2 Imm.L.R. (3d) 191 (F.C.T.D.)).

[31] The Board may evaluate the probative value of evidence, including documentary evidence, and the standard of review applicable to such findings is patent unreasonableness (see *Akhter* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 914).

[32] I wish first to deal with Issue 2.

[33] **Issue 2**

Did the Board err in its consideration of the evidence?

In its decision, the Board stated the following at page 5:

> It is difficult to be clear about how the Cuban authorities would treat the claimant and whether they would see her as a young person who was lured by the prospects of a more productive career in Canada or whether they would see her as an opponent of the Cuban system.
>
> The documentary evidence suggests that there is no fixed punishment for overstaying abroad but that the authorities decide each case on its own.

[34] A review of the documentary evidence discloses the following penal code section:

> LAW NO. 62.
> PENAL CODE.
> NATIONAL ASSEMBLY OF POPULAR POWER
> BOOK TWO
> SPECIAL PART
> OFFENCES
> TITLE II

> OFFENCES AGAINST THE ADMINISTRATION AND THE JURISDICTION
> CHAPTER 1
> VIOLATION OF THE DUTIES THAT ARE INHERENT TO A PUBLIC FUNCTION
> FIFTH SECTION
> Abandonment of Functions
> Article 135.1. Any civil servant or employee fulfilling a mission in a foreign country who abandons their mission, or completes or fail to return when required, expressly or tacitly, will be deprived of their freedom to three to eight years.
> 2. The same sanction applies to any civil servant or employee who upon the fulfillment of a mission abroad and against the express order of the Cuban government moves to another country.

[35] The evidence discloses that the applicant was at a government approved conference and decided to remain in Canada and not return to Cuba. The above provision of the Penal Code clearly indicates a fixed punishment for overstaying abroad. This is contrary to the Board's finding that there is no fixed punishment for her failure to return to Cuba. As I have no way of knowing how this information would have affected the Board's decision, I must set aside the Board's decision on this ground alone. It is for the Board to consider this evidence and say whether it would impact the Board's ultimate decision. I am of the opinion that the Board has made a reviewable error and the decision of the Board is therefore set aside and the matter is referred to a different panel of the Board for redetermination.

[36] Although I need not deal with the other issues raised by the applicant, I would note that some of the documentary evidence would seem to indicate that the situation of medical doctors in Cuba is different than other professionals.

[37] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[38] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c.27.:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97.(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97.(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au

Article 1 of the Convention Against Torture; or

sens de l’article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l’incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d’une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2151-06
STYLE OF CAUSE:	GISELLE ACOSTA RAMIREZ - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 24, 2007
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	July 6, 2007

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