Date: 20080304

Docket: IMM-961-06

Citation: 2008 FC 289

Ottawa, Ontario, March 4, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

WILBER ORLANDO CARTAGENA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Cartagena, a citizen of El Salvador, was orphaned at fifteen by the death of his mother in 2001. He had very little formal education at a rural school, and worked as a farm labourer around the small town of El Chilamate.

[2] In October 2001, Mr. Cartagena was approached by members of the Mara 18 gang, who attempted to recruit him. Following two other encounters with the gang, during which he was

threatened for his failure to join them, he went to the police for help. He claims that the police informed him that they would not open an investigation due to his age and the fact that he had not been attacked or hurt.

[3] Mr. Cartagena claims that he then spent until May 2003 working on farms around the small towns of El Rancho and El Chilamate. He asserts that, during this time, he was hiding and waiting for a friend of his mother, with whom he now lives in Toronto, to raise funds to help him leave El Salvador with the help of a "coyote", or smuggler. In May 2003, he left his country, travelling overland through Guatemala, Mexico and the United States before claiming refugee protection at Fort Erie in August, 2003.

[4] Mr. Cartagena's hearing before the RPD was conducted by video-conference and with interpretation. It extended over three days between March and November 2005. The transcript of the hearings indicates a few minor technological issues, but mainly a problem of communication of questions and their answers. It appears that Mr. Cartagena experienced difficulty in understanding what was being asked and in answering clearly.

[5] The Refugee Protection Division found that Mr. Cartagena was not a Convention refugee or a person in need of protection because he had a viable internal flight alternative (IFA) in the departments of San Miguel and San Vicente or in the capital city, San Salvador. The panel also found that he had not credibly established that the Mara 18 gang continued to search for him.

[6] The applicant raised two issues in his application for leave: whether procedural fairness was breached by 'reverse order questioning' under Guideline 7, and whether the Panel's finding of a viable IFA was unreasonable.

[7] The fairness of 'reverse order questioning' was upheld by the Federal Court of Appeal in its decisions in *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 and *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 199. As a result, the issue was not pursued at the oral hearing of this matter.

[8] At paragraph 39 of *Thamotharem*, Justice John Maxwell Evans noted that some claimants might, in exceptional circumstances, need to be questioned by their counsel first in order to have a fair hearing. At the conclusion of the hearing, I commented that this may have been such a case. However, I need not delve into that question as I will allow the application on the second issue raised.

[9] The first step in finding that a viable IFA exists is a factual finding, subject to a patently unreasonable standard of review. However, the second prong of the test is that the IFA must be reasonable for the particular claimant in the context of the particular country: *Thirunavukkarasu v. Canada (Minister of Employment and Immigration) (C.A.)*, [1994] 1 F.C. 589.

[10] The finding of the RPD panel that a viable IFA existed for Mr. Cartagena was unreasonable for a person in his situation. The member found the applicant's allegations of threats from the Mara 18 gang to be credible, and noted that gangs were a problem in El Salvador generally. He found,

however, that the claimant could move away from the Mara 18 gang and thus avoid persecution. Given the evidence about the high murder rate, high unemployment rate, lack of family of the applicant and the presence of the Mara 18 gang in San Salvador and similar problems in the departments of San Vicente and San Miguel, it was unreasonable for the member to find that Mr. Cartagena could safely relocate to any of these places.

[11] The member noted the fragile mental health of Mr. Cartagena, but maintained his finding of the existence of a viable IFA despite the psychological opinion in evidence. Psychological evidence is central to the question of whether the IFA is reasonable and cannot be disregarded: *Singh v. Canada (Minister of Citizenship and Immigration)*, 97 F.T.R. 139, [1995] F.C.J. No. 1044. The panel failed to thoroughly assess the reasonableness of the locations suggested as viable IFAs in the context of Mr. Cartagena's situation and vulnerable mind-set.

[12] A young man with little education and no prospects of employment in any field other than menial labour is in a high risk category. His lack of family and fragile psychological state compound that risk. On the evidence, the decision under review was, in my opinion, unreasonable and must be returned for reassessment by a differently constituted panel.

[13] No questions were submitted for certification, and none are certified.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application for judicial review is allowed and the matter is remitted for consideration by a differently constituted panel. No questions of general importance are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-961-06
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APPEARANCES:

Douglas Lehrer	FOR THE APPLICANT
John Loncar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

DOUGLAS LEHRER VanderVennenLehrer Toronto, Ontario	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT