

Date: 20080829

Docket: IMM-5304-07

Citation: 2008 FC 983

Ottawa, Ontario, August 29, 2008

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

**SEFER HASSIDIM LIBERATO GONZALEZ
ARELI VEGA MUNOZ
ASEEM ZMSHAEL LIBERATO VEGA
LAKSHMI ARELI LIBERATO VEGA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Sefer Hassidim Liberato Gonzalez is a citizen of Mexico, whose claim for refugee protection was rejected by the Refugee Protection Division of the Immigration and Refugee Board on the grounds that he had a viable internal flight alternative in Mexico City, amongst other places, and because adequate state protection was available to him in Mexico. The remaining applicants are Mr. Liberato's wife and children, whose claims were based upon that of Mr. Liberato, and were dismissed for the same reasons.

[2] The applicants submit that the Board's decision should be set aside, as they have a reasonable apprehension of bias on the part of the presiding member. The applicants further assert that the Board erred in making unreasonable findings of fact, in misconstruing the basis for the applicants' claim, and in making unreasonable findings in relation to the availability of state protection and an internal flight alternative for the applicants within Mexico.

[3] For the reasons that follow, I find that having failed to raise the issue of bias at the earliest reasonable opportunity, the applicants have waived their right to object to the conduct of the presiding member. I am also satisfied that the Board's finding that the applicants had a viable internal flight alternative available to them in Mexico City was one that was reasonably open to the Board. Given that the availability of an internal flight alternative is dispositive of the applicants' claim, it is not necessary to address the applicants' remaining arguments.

The Bias Issue

[4] The applicants take issue with certain comments made by the presiding member shortly after the commencement of their refugee hearing. In order to put these comments into context, it is necessary to have an understanding of the nature of the applicants' claim.

[5] Mr. Liberato was employed as a manager at a propane company in Hidalgo, where, he says, he enjoyed a very good relationship with his employees. Because of this, Mr. Liberato claims that he was approached by representatives of a union. These individuals wanted him to exert influence

over his employees, in order to get them to vote for the governing PAN party in the upcoming elections.

[6] Mr. Liberato says that he did not want to become involved with the union because it was corrupt, and because its members engaged in violent activities. As a consequence, he declined to assist as requested. Mr. Liberato says that he was then subjected to various threats, and that his wife was stalked and assaulted by an associate of the union.

[7] From a review of the transcript, it appears that early in the course of the applicants' refugee hearing, the presiding member was having some difficulty understanding the nature of the applicants' claim. In particular, the member could not understand how, as a manager, Mr. Liberato could have been expected to join the union. Moreover, given that elections in Mexico were carried out by way of secret ballot, the presiding member also could not understand how Mr. Liberato could have been expected to force his employees to vote in a particular way.

[8] In an apparent effort to understand the nature of the claim, an exchange took place between the presiding member, counsel for the applicants and Mr. Liberato with respect to the prevalence of electoral corruption and voter manipulation in Mexico. The relevant portion of the transcript is included as an appendix to this decision.

[9] The applicants' hearing then proceeded, without any objection to the presiding member continuing on with the case being made by counsel for the applicants on the basis that a reasonable

apprehension of bias had arisen as a result of the comments in issue. At the conclusion of the evidentiary portion of the hearing, the presiding member then asked counsel if he wished to provide written submissions, an offer which counsel accepted.

[10] Counsel provided his written submissions to the Board some two weeks later, in accordance with the timetable that had been established by the presiding member. Those submissions contained the following statements:

I have serious reservations about how the panel conducted this hearing and submit that the panel should withdraw from consideration of this claim and remit the claim for a further hearing.

What concerned me the most was the panel's assertion early in the hearing that the claim made no sense, apparently on the basis that it involved electoral corruption. This leads me to believe that the panel does not entertain the idea of government corruption existing in Mexico. This is amply documented in the material, as I have stated.

[11] The presiding member dealt with the applicants' request that he recuse himself in his reasons for decision. In dismissing the request, the member observed that the hearing is the most opportune time to make bias objections, and that no timely objection had been raised in this case.

[12] The presiding member went on to hold that counsel's allegations did not give rise to a reasonable apprehension of bias on the part of the member, and that the hearing had been conducted fairly.

[13] Counsel for the applicants, who, it should be noted, was not the counsel appearing for the applicants before the Board, submitted in argument before this Court that it is not always essential that an objection on the basis of a reasonable apprehension of bias be raised at the earliest reasonable opportunity, especially in refugee cases, given that refugee hearings often proceed in phases.

[14] In support of this contention, counsel relies on the decision of this Court in *Moin v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 473.

[15] Counsel further submitted that the presiding member's finding that his own conduct did not give rise to a reasonable apprehension of bias was clearly in error, and that the decision should be set aside on this basis.

Analysis on the Bias Issue

[16] Neither side addressed the issue of the applicable standard of review in relation to the bias issue. Given that a finding of a reasonable apprehension of bias on the part of an adjudicator goes to the fairness of the hearing, I am of the view that no deference is owed to views of the presiding member in this regard, and it is up to this Court to form its own opinion as to the fairness of the hearing: see *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, at paragraphs 129 and 151, and *Canada (Attorney General) v. Clegg*, [2008] F.C.J. No. 853.

[17] The jurisprudence regarding when objections based upon a reasonable apprehension of bias must be made is very clear. That is, an objection to the jurisdiction of an administrative tribunal based upon a reasonable apprehension of bias must be raised at the earliest practicable opportunity, failing which a party will be deemed to have waived its right to object: see for example, the decisions of the Supreme Court of Canada in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, and of the Federal Court of Appeal in *Zündel v. Canada (Canadian Human Rights Commission) (re Canadian Jewish Congress)*, [2000] F.C.J. No. 1838, and *In Re Human Rights Tribunal and Atomic Energy of Canada Ltd.*, [1986] 1 F.C. 103 at p. 112.

[18] The applicants were represented by counsel at their refugee hearing. Moreover, this is not a case where the significance of the member's comments could not have been immediately apparent to the applicants or their counsel, nor was it a case where additional matters arose during the course of the hearing that, when taken cumulatively with the member's earlier comments, gave rise to a reasonable apprehension of bias.

[19] Having regard to the nature of the applicants' objection in this case, it is clear that as soon as the disputed words were out of the mouth of the presiding member, the applicants and their counsel were in possession of all of the relevant information and evidence relating to the matters that they now say gives rise to a reasonable apprehension of bias on the part of the presiding member.

[20] Not only did the applicants and their counsel not raise their bias objection at the time that the impugned statements were made, they continued on with the evidentiary portion of the hearing to its completion, without objection. Indeed, it was not until some two weeks later that the applicants first raised the issue of apprehended bias on the part of the presiding member.

[21] In such circumstances, it cannot be said that the applicants have raised their bias objection at the first reasonable opportunity. As such, they are deemed to have waived their right to object.

[22] I have considered Justice de Montigny's decision in the *Moin* case relied upon by the applicants. In my view, the case is of limited assistance, turning, as it does, on the particular facts of that case. Moreover, not only did Justice de Montigny conclude that the issue in that case was not actually one of bias – actual or apprehended - but rather was one of a misapprehension of the evidence, more importantly, he himself reiterated the principle that objections involving allegations of bias had to be raised at the first reasonable opportunity: see *Moin*, at paragraph 41.

[23] Before leaving this issue, I would like to observe that nothing in this analysis should be viewed as approving of the comments made by the member in this case, which were most certainly ill-advised.

Internal Flight Alternative

[24] The applicants submit that the Board erred in concluding that they had an internal flight alternative in Mexico City. Given that Mexico City is the location of the union's head office, the applicants say that it was simply not reasonable to expect the applicants to have moved there.

[25] It is not disputed that the burden is on the applicants to demonstrate that they could not have lived safely in any part of their country of origin, and counsel for the applicants candidly conceded that the evidence on this point was very thin.

[26] Given that the applicants' problems allegedly related to Mr. Liberato's position with the propane company, the Board found that it would not have been unreasonable for him to have quit his job and relocated to Mexico City in order to avoid the difficulties that he was encountering with the union.

[27] Mr. Liberato submitted that the Board erred in its internal flight alternative analysis, as it was unreasonable to expect him to quit his job in order to avoid the risk that he says that he and his family faced in Mexico. I do not agree.

[28] In *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99, the Federal Court of Appeal considered the extent to which a claimant should be expected to make choices to free him- or herself from the risk of harm, before being able to seek international protection. In this regard, the Court concluded that it was not unreasonable to expect an individual to take steps to

protect themselves that would not deprive the individual of a general ability to earn a living. There is no evidence in this case that Mr. Liberato would not be able to find another job in Mexico City.

[29] Moreover, the fact that the union had its head office in Mexico City does not mean that Mexico City could not be a reasonable internal flight alternative for the family. Once Mr. Liberato resigned from the company, he would presumably no longer be in a position to influence his employees, and would thus be of little interest to the union.

[30] Moreover, the suggestion that the union would continue to pursue the family, even if Mr. Liberato resigned from the company as part of a personal vendetta is really based on nothing more than speculation.

[31] As was noted in the introductory comments to this decision, the applicants have raised a number of issues on this application for judicial review. However, the Board's finding that the applicants had a viable internal flight alternative in Mexico City is dispositive of the claims, and it is therefore unnecessary to address the remainder of the applicants' arguments.

Conclusion

[32] For these reasons, the application for judicial review is dismissed.

Certification

[33] Counsel for the applicants has suggested a question for certification regarding whether it is necessary to raise an issue of bias at an applicant's refugee hearing in order to be able to raise it on judicial review. In my view, the law in this area is well-settled. Moreover, what will be considered to be the first reasonable opportunity in a particular case will turn entirely on the facts of that case. As a consequence, I decline to certify the proposed question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed; and
2. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5304-07

STYLE OF CAUSE: SEFER HASSIDIM LIBERATO GONZALEZ
ET AL v. THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: August 26, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** MACTAVISH, J.

DATED: August 29, 2008

APPEARANCES:

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APPENDIX

PRESIDING MEMBER: You see, sir, you tell us that it is against the law to join a union as a manager. This union that wanted you to join is a union supported by the federal government. What I have trouble with, sir, they must know the law. Why would they want you to join?

MALE CLAIMANT: Because as I was just explaining to you, that they are people who are corrupt and they want to handle things in an underground manner, in a surreptitious manner. And then they wanted my workers to be forced by me and not by the union, to be forced to vote for them by me and not by the union.

PRESIDING MEMBER: Sir, nobody can force anybody to vote in a certain way if the vote is confidential, secret.

MALE CLAIMANT: Yes, that's right. That is part of the Mexican Constitution (*sic*); the vote is exercised freely.

PRESIDING MEMBER: How could they force you to force them to vote PAN?

MALE CLAIMANT: Well, because the PAN is the government – I mean PRI is part of the government right now but they still want the masses to support them. They need people. They need members.

PRESIDING MEMBER: But it's got nothing to do with you, sir. You could not force the people to vote a certain way, is that correct?

MALE CLAIMANT: Legally, no.

PRESIDING MEMBER: Even illegally, sir, because the vote is secret.

MALE CLAIMANT: But if any of the workers reports me to the federal government, then I will be penalized. I would have been punished.

PRESIDING MEMBER: That's not the question, sir. I asked you how could you force them how to vote. And you said legally you could not do that. If the vote is secret, how could you force them in any way?

MALE CLAIMANT: Well, in fact I don't know through what means I could force them to vote a certain way, because I'm not used to that. But, for example, for argument's sake, if for example I threaten the workers with firing them if they do not join the PAN ranks, that could be a way, because if they join the PAN ranks they would get a party membership card.

PRESIDING MEMBER: That's pretty far fetched.

MALE CLAIMANT: But what else could I do?

PRESIDING MEMBER: I don't know, sir.

COUNSEL: You think voter manipulation in Mexico is far-fetched, Mr. Member?

PRESIDING MEMBER: No, but how would you find them if they didn't join the union? And yes, it's far-fetched in Mexico. The vote is secret. I've been there for 30 years.

COUNSEL: So, you think it's been free and fair elections in Mexico for 30 years?

PRESIDING MEMBER: Most of the time. Just as fair as here. I don't want to argue about it.

COUNSEL: You don't want me to argue about it?

PRESIDING MEMBER: No, this is not a political argument. I don't understand this whole story.

COUNSEL: Well, we told you. They want him to influence politically. It's right here sitting in the PIF. And he's told you it's not right. It's in the PIF in paragraph 5. So –

PRESIDING MEMBER: But he can't join if he's a manager.

COUNSEL: Well, he told you that. He doesn't need to be told that, it's sitting right here in paragraph 5.

PRESIDING MEMBER: So, then the rest of the story doesn't make any sense. If he can't join, why would all this happen?

COUNSEL: Voter manipulation. Pressure by someone in a position of influence to behave in a certain way because –

Mr. Member, you're on record as saying that elections in Mexico have been the same as in Canada for 30 years.

PRESIDING MEMBER: So, we were having a discussion. We're not putting anything on the record. If that's what ---

COUNSEL: Well, I don't know, that's what I heard. I think that's –

PRESIDING MEMBER: If that's how you want to go, then we can argue about Mexico and forget about your claimant. Do you want that?

If the law says as a manager he can't join and he doesn't join, then the rest of the story makes no sense. And I'm trying to find out how it makes sense. We're not talking about voter manipulation. We're talking about him. How did he become involved with that if he by law could not join? It makes no sense. And that's what I'm trying to find out. How does that make sense? Why would a union supported by the government force him to do something illegally,

something he couldn't do, something his company would not allow him to do? So, I'm trying to find out what his story is all about. Do we get the truth here?

COUNSEL: Okay.

PRESIDING MEMBER: Do you understand what I'm saying?

COUNSEL: Yeah, well, if the member is saying that it's the member's view that it's impossible in Mexico to manipulate elections ---

PRESIDING MEMBER: I never said it was impossible. I'm trying to find out how it is.

COUNSEL: Then you're reading a different history of Mexico than I'm reading, Mr. Member.

PRESIDING MEMBER: Okay. I haven't heard it yet.

COUNSEL: He's tried to make it clear that he is doing so surreptitiously.

PRESIDING MEMBER: Counsel, you ask the questions. I will go off from asking questions. You ask the questions. You try to find out for me how that works. [Emphasis added]