Date: 20081106

Docket: IMM-4652-07

Citation: 2008 FC 1243

Ottawa, Ontario, November 6, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

JOSE FERNANDO RODRIGUEZ DIAZ

Applicant

and

THE MINISTER OF CITIZENSHIP & 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 Board (the Board), dated October 9, 2007, which found that the applicant was neither a Convention refugee nor a person in need of protection.

[2] The applicant requested that the decision be set aside and the matter referred back to a newly constituted panel of the Board for redetermination.

Background

[3] Jose Fernando Rodriguez Diaz (the applicant) is a citizen of Mexico. He claims refugee protection based on his fear that his brothers will kill him and that he will be persecuted by Mexican society because of his sexual orientation and because he is HIV positive.

[4] The applicant alleged that as a child he was sexually abused by his stepfather. He claimed that his brothers also assaulted him once they learned that his biological father was a previous lover of their mother's. The applicant also described instances where he was detained and assaulted by the Mexican police.

[5] Starting in 1985 and continuing for approximately two years, the applicant travelled to Miami returning every six months to Mexico in order to renew his visitor visa status. In 1991, the applicant was diagnosed HIV positive. At this time he was living in Mexico. The applicant claimed that his employer discovered his illness and offered him a severance package or he would be fired. The applicant also submitted that he was fired again from another job in 1995 because his employer discovered his sexual orientation and illness. The applicant attempted to start his own business, but it subsequently closed.

[6] When the applicant's stepfather passed away, he shared equally in the estate which included a sugar plantation, a coffee plantation and a house. The applicant claimed that in 1996, one of his brothers threatened to kill him if he did not leave Mexico. As a result, the applicant claims to have given his sister power of attorney to deal with the family properties and left for the United States where he remained for approximately nine years without returning to Mexico. The applicant returned to Mexico in April 2005, remained for a matter of days and then travelled to Canada. Shortly after his arrival in Canada, the applicant applied for refugee protection. In a decision dated October 9, 2007, the Board found that the applicant was neither a Convention refugee, nor a person in need of protection. This is the judicial review of the Board's decision.

Board's Decision

[7] The Board's determination was that the applicant was not a Convention refugee or a person in need of protection because of the availability of adequate state protection and a viable Internal Flight Alternative (IFA) to Mexico City.

[8] The Board began its analysis by stating the two part test to be applied in determining whether there was an IFA: 1. there is no serious possibility of the claimant being persecuted or subjected personally, on a balance of probabilities, to a danger of torture or to a risk to life or risk of cruel and unusual treatment or punishment in the proposed IFA area; and 2. conditions in the IFA area must be such that it would be unreasonable in all the circumstances, for the claimant to seek refuge there. Related to the first prong, the Board first assessed the fear from the applicant's

brothers. The Board accepted that the applicant had provided evidence suggesting that his brothers had harassed and assaulted him, but noted that there was no documentary evidence to show that he had sought medical attention. Also, the applicant had not claimed refugee protection during his years in the United States as a result of the harassment and assaults. The Board also noted that when asked if handing over his share of the family property would eliminate the problems with his family, the applicant responded "yes". The Board found that "it is not unreasonable to expect the claimant to dispose of his portion of the inheritance if by doing so he could stop the alleged agent of persecution from harming him." The Board went on to state that in any event it questioned "the likelihood that the claimant's brother would carry through with the alleged threat to kill him". The Board discussed how even after the death threat was made towards the applicant, there were numerous instances of contact between the applicant and his brothers and as such, they have had numerous opportunities to kill him. The Board found that "while the threats are doubtlessly unsettling for the claimant" the applicant did not face a serious possibility of persecution at the hands of his brothers.

[9] The Board then turned its attention to whether the applicant's sexual orientation undermined Mexico City as an IFA. The Board reviewed the documentary evidence and found that "in weighing all the evidence, […] the most current documentation persuades the panel that laws and efforts of the state have had a positive impact for shortcomings that may have occurred in the past." The Board went on to state that the applicant had the burden of providing "clear and convincing proof" of the state's inability to protect. The Board noted that the last incident, in which the police targeted

the applicant occurred in 1989 and the documentary evidence showed that since then much had changed in Mexico City.

[10] The Board then discussed whether the applicant's HIV positive status undermined Mexico City as an IFA. The Board stated that the documentary evidence on HIV positive status indicated that in August 2003, then President Vicente Fox, announced that the government would subsidize medication costs. The Board stated that this was "a major initiative that was not available to the claimant when he was diagnosed as HIV positive in 1991".

[11] Related to the second prong of the IFA test, the Board stated "given that the claimant is an educated person who has worked, while he was in Mexico, both in the private sector and as a business owner, and given the existence of anti-discriminatory legislation in the Federal District the panel determines that it is not unreasonable, under the circumstances, for him to live in Mexico City".

[12] The Board's final conclusion was that there existed an IFA to Mexico City and adequate state protection for the applicant. As such, the Board rejected his claim for refugee status.

Issues

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

1. Did the Board err at law by assessing the applicant's refugee claim solely on the basis of his sexual orientation and fail to assess and consider the fact of the applicant's HIV positive status when determining if he has a viable IFA in Mexico City?

2. Did the Board make numerous critical findings of fact, including those on objective country conditions in Mexico City, without a clear evidentiary basis and thus amounting to sheer speculation?

3. Did the Board err at law by stating key evidence in the applicant's claim?

[14] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in finding that the trauma described in the psychological report was not exclusively related to issues identified in the claim?

3. Did the Board err in finding that the applicant's brothers' hatred was based on the inheritance and not the applicant's sexual orientation? Moreover, did the Board err in finding that it was not unreasonable to expect the applicant to dispose of his portion of the inheritance in order to avoid the alleged persecution?

4. Did the Board err in finding that the applicant did not face a serious possibility of persecution at the hands of his brothers?

5. Did the Board err in stating key evidence in the applicant's claim?

6. Did the Board err in its analysis of a viable IFA by failing to consider the applicant's HIV positive status?

Applicant's Written Submissions

[15] The applicant submitted that the Board failed to address the applicant's claim that his HIV positive status would inevitably lead to incidents of stigmatization, severe discrimination and cumulative harassment amounting to persecution. The applicant submitted that he provided ample evidence to show that since his diagnosis, he has faced severe discrimination and harassment amounting to cumulative harassment and persecution (*Tolu* v. *Canada (Minister of Citizenship and Immigration)* (2002), 218 F.T.R. 205; *Packiam* v. *Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No.779). The applicant claimed that in applying the two pronged test for an IFA, the Board failed to consider the kind of life the applicant has as an HIV positive person living in Mexico City. It was submitted that the Board erred in only considering the availability of medicine for HIV positive individuals. The Board should have considered all the circumstances feared by people in the applicant's position such as physical abuse, extortion and denial of proper employment, housing and services. The applicant also submitted that in analyzing whether an IFA existed the Board erred in relying on evidence from 2003 and then stating that "the most current documentation persuades the panel that laws and efforts of the state have had a positive impact for shortcomings that may have occurred in the past". The applicant alleged that the Board has a duty to seek out the most current information.

[16] The applicant submitted that a number of the Board's findings were baseless and made without providing reasons. It is trite law that all critical findings made by the Board must be supported with a clear evidentiary basis. Failure to lay out a clear and specific evidentiary basis is

patently unreasonable and renders each of the findings to nothing more than sheer speculation (*Armson* v. *Canada (Minister of Employment and Immigration)* (1989), 9 Imm. L.R. (2d) 150 (F.C.A.)). The applicant argued that the Board erred in finding that the trauma affirmed in the psychological report was not "exclusively related to issues identified in [the] claim." The applicant submitted that there was no evidence upon which to base this finding and the Board failed to give reasons for it. The applicant also submitted that the Board erred in finding that it was not unreasonable to expect the applicant to give up his inheritance to eliminate the possibility of persecution from his brothers. The applicant argued that there was no evidence before the Board to support that the reason and motive for the applicant's brothers' hatred of him was due to his receiving a portion of his step-father's property. Moreover, the evidence showed that the problems with the applicant's brothers began before his stepfather passed away. And finally, the applicant submitted that the Board erred in finding that the applicant was not at risk of being persecuted by his brothers. It was argued that the Board found that the applicant's brothers may assault him, but they would not go as far as to kill him. The applicant submitted that this is nonetheless persecution.

[17] And finally, the applicant argued that the Board misunderstood the applicant's testimony during the hearing. The Board in its reasons stated that when asked if giving up his share in the inheritance would end his brothers' hatred of him, the applicant responded "yes". The applicant submitted that to the best of his knowledge, he responded "no" and re-affirmed that nothing would change his brothers' feelings and actions towards him.

Respondent's Written Submissions

[18] The respondent submitted that the errors alleged by the applicant, namely that the Board failed to consider whether cumulative harassment amounted to persecution, gave too little weight to the psychological report, and misunderstood the applicant's evidence, are immaterial given the Board's finding on state protection and a reasonable IFA. The respondent submitted that the applicant can only be successful on judicial review if he convinces the Court that the Board erred in its analysis of state protection and IFA.

[19] With regards to the Board's findings on IFA and state protection, the respondent submitted that these are factual determinations and the Court ought not to intervene so long as the Board followed the proper analysis and made a factual determination that was open to it based on the evidence (*Ortiz* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 1365 at paragraphs 34 and 35). The respondent submitted that the Board correctly articulated the two part legal test to be applied for an IFA.

[20] With regards to the state protection portion of the IFA test, the respondent stated that the applicant failed to show that he had made any attempts to seek the protection of Mexican authorities in 2005 and as such, the burden was on the applicant to adduce clear and compelling evidence to show that it was objectively unreasonable to expect him to approach the state for protection. In a functioning democracy with the apparatus and the willingness to provide its citizens with some measure of protection, a failure to pursue state protection opportunities within the home state will

usually be fatal to a refugee claim (*Camacho* v. *Canada (Minister of Citizenship and Immigration)*, 2007 FC 830 at paragraph 11). The respondent submitted that the applicant's argument that the Board failed to assess the protection available for HIV positive persons (with the exception of the availability of medicine) cannot be accepted because the evidence upon which the applicant relies is not sufficiently material to contradict the Board's state protection finding. The respondent submitted that the portions of country documentation cited by the applicant in the memorandum speak generally of discrimination against people who are HIV positive and not whether state protection is available. Therefore, the evidence presented was far from the "clear and convincing" evidence required to rebut the well-established presumption that the Board considered all the evidence.

[21] With regards to the second prong of the IFA test, the respondent submitted that the applicant has failed to show that the discrimination HIV positive persons face in Mexico City amounts to persecution. The respondent submitted that the applicant must show "actual and concrete" evidence that his life and safety would be jeopardized by travelling or relocating to Mexico City (*Ranganathan* v. *Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 164 (C.A.)). The respondent submitted that the Board clearly considered the availability of HIV/AIDS treatment in Mexico City and possible job opportunities for the applicant.

Applicant's Written Reply

[22] The applicant submitted that the Board's IFA analysis cannot stand if it is not sound. It was submitted that in failing to address the reasonability of a life in Mexico City for an HIV positive

individual such as the applicant, the Board's analysis and findings on IFA cannot stand. The applicant submitted that the Board's analysis was limited to the availability of medical supplies. Further, the Board conducted a superficial analysis of discrimination laws without considering the effectiveness of this legislation at the operational level.

Analysis and Decision

[23] **Issue 1**

What is the appropriate standard of review?

The Supreme Court of Canada in *Dunsmuir* v. *New Brunswick*, [2008] S.C.J. No. 9 collapsed the standard of reasonableness *simpliciter* and patent unreasonableness for a more straightforward standard of reasonableness. *Dunsmuir* above, also streamlined the steps to take in establishing the appropriate standard of review, which was previously referred to as the "pragmatic and functional" approach. The Supreme Court proposed a two step process at paragraph 62:

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[24] Critical to this judicial review, is the standard of review with respect to viable IFA determinations for applicants. *Ortiz* v. *Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No.1716, summarizes the features of IFA determinations in judicial review, "[Justice Richard] held at paragraph 26 that Board determinations with respect to an IFA

deserve deference because the question falls squarely within the special expertise of the Board. The determination involves both an evaluation of the circumstances of the applicants, as related by them in their testimony, and an expert understanding of the country conditions" from *Sivasamboo* v. *Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 2018. In light of these issues, this Court has found the standard of review to be patent unreasonableness pre-*Dunsmuir* above. See for instance: *Nwokomah* v. *Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1889, *Chorny* v. *Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1263, *Nakhuda* v. *Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J No. 882. As Justice de Montigny stated in *Ako* v. *Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 836 at paragraph 20:

> It is trite law that questions of fact falling within a tribunal's area of expertise are generally reviewed against a standard of patent unreasonableness. More particularly, this Court has consistently found that this is the proper standard to apply with respect to the existence of a viable internal flight alternative [...]

Thus, it was well-settled that this Court should not disturb the Board's finding of a viable IFA unless that finding was patently unreasonable. The standard of review, therefore, is reasonableness as a result of *Dunsmuir* above.

[25] Two other important issues at play in this review involved the evaluation of the evidence as it related to the persecution of the applicant. Justice Tremblay-Lamer in *Liang* v. *Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 572 quoted the long held view that "the identification of persecution behind incidents of discrimination or harassment is

not purely a question of fact but a mixed question of law and fact, legal concepts being involved" (*Sagharichi* v. *Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 796 and is reviewable on the standard of reasonableness *simpliciter* (*Herczeg* v. *Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1434; *Hitti* v. *Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1580. In light of *Dunsmuir* above, the standard of review is reasonableness.

[26] The remaining issue involved a strictly factual finding based on testimonial evidence. Factual findings attract a high standard of deference. In numerous pre-*Dunsmuir* decisions, this Court has held that the appropriate standard of review was patent unreasonableness (*Soosaipillai* v. *Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1349), which has collapsed to the standard of reasonableness.

[27] The Supreme Court of Canada in *Dunsmuir* above, at paragraph 47, took the occasion to enunciate the elements of a decision on the standard of reasonableness which is salient to the case at hand:

> "[a] court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

[28] I propose to first deal with Issue 6.

[29] **Issue 6**

Did the Board err in its analysis of a viable IFA by failing to consider the applicant's HIV positive status?

The applicant submitted that the Board erred in its IFA analysis by failing to consider the applicant's HIV status with the exception of the availability of medication in Mexico City. The Board's analysis of discrimination laws was also challenged as being superficial.

[30] The Federal Court of Appeal dealt with the issue of internal flight in *Rasaratnam* above, and stated that "…the IFA concept is inherent in the Convention Refugee definition". In order for the Board to find that a viable and safe IFA exists for the applicant, the following two-pronged test, as in *Rasaratnam above*, must be applied:

> (1) the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the proposed IFA; and
>
> (2) conditions in the proposed IFA must be such that it would not be unreasonable, upon consideration of all the circumstances, including consideration of a claimant's personal circumstances, for the claimant to seek refuge there.

[31] In this case, the Board found that the applicant's sexual orientation did not undermine Mexico City as a reasonable IFA for the applicant. They pointed to anti-discrimination laws in the Federal District of Mexico City and "an increasingly vocal and visible subculture" to rebut the applicant's claim that it was unreasonable for him to approach authorities and seek protection. In

addition, in 2003 Mexico's President (at the time), Vincente Fox, announced that the government would subsidize medication costs for its citizens diagnosed as HIV positive.

[32] I find that there are two issues that were not adequately considered that relate to a reasonable finding of a viable IFA for the applicant. The applicant suggests that negative stigmas towards HIV positive Mexicans affect the delivery of the treatment and medications by medical staff in Mexico. This documentary evidence suggests that this is where HIV positive Mexicans, such as the applicant, are at risk. The Board did not address this issue particular to the applicant's circumstances as an HIV positive Mexican.

[33] Furthermore, while the respondent is correct in pointing out that lack of employment is generally not a sufficient reason to determine that an IFA is unreasonable, barriers to employment affect an HIV positive Mexican in an uniquely discriminatory way. The documentary evidence submitted by the applicant suggests that medical testing for HIV status for employment purposes is prevalent in Mexico from factories to professional positions. Despite the fact that the applicant has been successful in obtaining positions in the past, the documentary evidence suggests that the applicant may face restrictions in earning a livelihood because of his HIV status. In *Xie* v. *Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 286 systemic governmental inference with the opportunity to find work was found to be a serious restraint on an individual. In this case, the Board did not adequately address whether the applicant had proven that systemic barriers associated with HIV testing and employment amounted to persecution on a

balance of probabilities. The interrelated aspects of the applicant's socio-economic status and HIV positive status are important considerations that the Board overlooked.

[34] The Federal Court of Appeal established, however, that there is a very narrow foundation for a refugee claim based on access to medical treatment. An applicant may not establish a refugee claim merely on the basis that medical treatment he or she could or is receiving in the asylum state is superior to that in the country of origin (*Covarrubias* v. *Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1682. This is where nevertheless, in the domain of refugee law, that particular social groups such as HIV positive individuals have established a foundation for successful refugee claims.

[35] The issue of discrimination is particularly important because of the potential for the applicant to experience ostracism from friends and family if returned to Mexico. As stated above, systemic barriers to employment may preclude access to private health care. The applicant may have to depend upon public medical care which can be inadequate. Inadequate health care in itself, is not a foundation for a claim (if it is delivered in a non-discriminatory manner, as above). However, the documentary evidence suggests that in Mexico, families of HIV positive Mexicans play an important role in caring for people in the position of the applicant because of societal discrimination. The documentary evidence provides instances where HIV positive friends living in Mexico had to rely on family to get medical insurance because of barriers to employment or had to rely on family to pay for medications of the black market.

[36] The applicant does not appear to have this option. The applicant testified that no one in his family knows that he is HIV positive and that their reaction would be very negative with the exception of his sister. The applicant has been threatened and assaulted by his brothers related to property holdings as well as his sexual orientation. Further, his relationship with them prevents his mother and sister from contact with him because of the threat of retaliation. There is a police report documenting an assault against the sister from one of the brothers related to the brother's conflict with the applicant. Further, when the applicant last returned to Mexico City, the mother was not able to see her son because of his brothers. Despite the close relationship with his sister, she is a single mother of two children with little money and does not live in Mexico City. Discrimination because of the applicant's HIV status has the potential for far more devastating and serious consequences. While the Board must assess the applicant's claim objectively, it must be individualized and in this issue, it turns on its own set of facts.

[37] While I acknowledge that the Board does not have to canvass every piece of evidence in its decision, *Dunsmuir* above, suggests that there are qualities that make a decision reasonable. In this case, the applicant's submissions that he would experience persecution and risk as an HIV positive Mexican without meaningful family support, with the potential for systemic barriers to employment, and with the potential for discrimination in health care delivery was not sufficiently addressed by the Board.

[38] Because of my finding on this issue, I need not deal with the remaining issues.

[39] As a result, the application for judicial review must therefore be allowed, the decision of the Board set aside and the matter referred to a newly constituted panel of the Board for redetermination.

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

JUDGMENT

[41] **IT IS ORDERED that** the application for judicial review be allowed, the decision of the Board set aside and the matter referred to a newly constituted 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 (IRPA):

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 Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au 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,

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

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

(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.

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

(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

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