Federal Court  Cour fédérale

Date: 20090220

Docket: IMM-1466-08

Citation: 2009 FC 176

Montréal, Quebec, February 20, 2009

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

FRANCISCO JAVIER DIAZ SERRATO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board dated February 19, 2008, wherein the applicant was found not to be a *Convention refugee* within the meaning of Section 96 nor a *person in need of protection* as defined in subsection 97(1).

II. The Facts

[2] Married and the father of a child, the applicant is a citizen of Mexico. All of the remaining members of his family reside in Mexico.

[3] The applicant alleges that he lost his job and was subsequently threatened by people associated with his former employer following complaints he had filed with regard to the security conditions of fellow workers acting under his supervision.

[4] Having moved twice with his family as a result of these threats, the applicant left his country for Canada to claim refugee protection.

III. The impugned decision

[5] The RPD concluded that the applicant was not a Convention refugee since it appeared from the evidence that he was a victim of a criminal vendetta from his former employer and that there was “no nexus between the present claim and any of the Convention grounds”, and further that as the claimant had not provided credible or trustworthy evidence he was a “person in need of protection”. The RPD also found that the applicant had not rebutted the presumption of the availability of state protection.

IV. The issue

[6] Did the RPD base its decision on negative findings made capriciously and without regard to the evidence and in turn render an unjust and unreasonable decision?

V. Analysis

Standard of Review

[7] The question is whether the RPD erred in her factual assessment of the applicant's claim. Therefore, the standard of review is reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9). As stated at paragraph 161 in *Dunsmuir*, "decisions on questions of fact always attract deference", especially when the credibility of the applicant is affected, and "when the issue is limited to questions of fact, there is no need to enquire into any other factor in order to determine that deference is owed to an administrative decision maker.

[8] In reviewing the Board's decision, the Court is mostly concerned with "the existence (or lack) of justification, transparency and intelligibility within the decision-making process [and also] [...] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at paragraph 47).

[9] Further, the Court will keep in mind that the Board is not required to establish the existence of state protection, since the onus to rebut the presumption of state protection remains at all times on

the refugee claimant (*Canada (Attorney General) v. Ward*, [1993] 2. S.C.R. 689). It is now stated law that the standard of reasonableness applies to decisions concerning the availability of state protection (*Chaves* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 193; *Navarro* v. *Canada (Minister of Citizenship and Immigration)*, 2008 FC 358).

State protection

[10] The applicant's main fear, if he were to return to Mexico, would be attacks, harassment and threats from his former employer or a person acting on his behalf. But, as the RPD mentioned in its decision, there are various avenues available to claimant in order to seek redress. Among these avenues, he had already chosen before coming to Canada to present a petition before an Arbitration and Conciliation officer; unfortunately, he left his country without waiting for the outcome of this recourse.

[11] Absent a complete breakdown of government apparatus, it is generally presumed that a state is able to protect its citizens. To counter this presumption, a claimant must provide clear and convincing evidence of the state's inability to protect (*Ward*, above).

[12] The applicant has chosen not to contest the RPD findings that "Mexico is a functioning democracy with a judiciary" and that "he has not rebutted the presumption of the unavailability of state protection" (*Espinosa v. Canada (Minister of Citizenship and Immigration*) 2005 FC 1393). This conclusion that state protection is available to the applicant constitutes sufficient grounds, in

itself, to reject his refugee claim (*Sarfraz v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1974 (T.D.) (QL); *Kharrat v. Canada (Minister of Citizenship and Immigration*), 2005 FC 106).

[13] In its reasons, the RPD reiterates that even if corruption remains a problem in Mexico, that country is a stable democracy with a functioning judiciary. It is also worth mentioning that the applicant's employer has previously been subject to legal sanction and that the applicant was able to submit a petition to the Arbitration and Conciliation office but unfortunately did not wait for the outcome.

[14] Consequently, not only was it not unreasonable for the RPD to conclude that state protection was available in Mexico to protect the applicant from his employer's alleged influence, but the applicant has chosen in the present recourse not to contest this conclusion with regard to the existence of available state protection for his problems. This conclusion provides sufficient grounds for the Court to reject the applicant's recourse against the impugned decision.

Credibility issue

[15] Although the RPD could have rejected the applicant's claim on the sole basis of the availability for him of state protection, it also found that the applicant had not even provided credible and consistent evidence in support of his claim.

[16] The RPD has a well-established expertise in determining questions of facts, particularly, as is the case here, in the evaluation of the applicant's credibility and subjective fear of persecution. The Court will not intervene in findings of fact reached by the RPD unless they are found to be unreasonable, capricious or unsupported by the evidence (*Aguebor v. Canada (Minister of Employment and Immigration)*(F.C.A.), [1993] F.C.J. No. 732; *Navarro*, above at paragraph 18). The RPD findings in this case with regard to the applicant's lack of credibility are relevant and supported by the evidence. They are not capricious and are sufficiently serious; therefore, they are not unreasonable.

Psychological Report

[17] At the conclusion of the first sitting, claimant offered and the RPD permitted a psychological examination of the applicant. The applicant argues that the inconsistencies noted in his testimony by the RPD indicate that the RPD ignored the psychological report produced thereafter which clearly explained his condition and the reasons for his difficulties.

[18] The applicant insists that the RPD erroneously rejected the psychological report which explained the difficulties of his testimony that led to the overall negative credibility findings used to reject his claim. He alleges that the RPD disregarded this important element of evidence when it made its decision and, consequently, this Court's intervention is warranted.

[19] Essentially the applicant takes issue with the weight that the RPD gave to the report in question, which indicated that he suffered from Post Traumatic Stress Syndrome that would have caused a certain form of amnesia.

[20] The RPD had this to say on the psychological report in question:

> At the second sitting the claimant deposited a report from psychologist Juan Carlos Andrade. It appears he would have met the claimant after the first hearing. According to Mr Andrade the claimant would be suffering from Post Traumatic Stress Syndrome which would cause a form of amnesia. The expert bases the conclusion of Post Traumatic Stress Syndrome on the evidence as provided by the claimant. In this context, the panel does not believe the claimant is credible. It is not a question of forgetting incidents, it is a question of consistency of his evidence beginning at the Port of Entry through to the hearing. The panel does not believe this is a credible witness.
> [Emphasis added]

[21] The RPD did conduct a thorough analysis of all of the evidence filed in support of the applicant's claim and it was entitled to afford little probative value to the psychologist's report since it was based on the applicant's own allegations. The medical expert tried by his report to excuse the weaknesses of the applicant's testimony, but the medical expert was not present at the hearing to hear the applicant's testimony and to judge the inconsistencies in his claim; and in this regard the RPD benefited of the advantage of having heard the applicant, of having read his written declaration and of deciding if the alleged Post Traumatic Stress Syndrome could constitute a valid excuse for the inconsistencies or not.

[22] Let us not forget that an expert report is a piece of evidence like any other; hence it was up to the RPD to decide how much weight it should be given. It is not for the expert to decide if the inconsistencies in the applicant's testimony could be excused by his Post Traumatic Stress Syndrome. Having analyzed the evidence, the RPD found that there it was not a question of amnesia or forgetting incidents but of inconsistencies. In other words, the RPD found that there was no relation between the syndrome found and the inconsistencies. So much then for the expertise even if the RPD could have commented on it in greater detail.

[23] If, as it is obviously the case here, the RPD did consider the report, but did not believe that the psychological opinion expressed therein explained the inconsistencies, then the RPD was entitled to give it little or no weight (*Min v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1676 at paragraph 6).

[24] Had the RPD dismissed the applicant's claim solely on the basis of his demeanour or his inability to recall certain events, the expert report might have been a more determining factor in the RPD's evaluation of the evidence. But this is not the case here since the RPD noted serious contradictions, inconsistencies and implausibility in the applicant's testimony that had no relation with the alleged syndrome he allegedly was suffering even before his problems with his employer. In these circumstances, the RPD was reasonably entitled to assess the impact of the report as it did in light of the overall evidence and to give it little weight.

[25] Further, the RPD clearly rejected the applicant's refugee claim because it found his story not credible, and the psychological assessment could not affect this conclusion.

[26] Moreover, even if the RPD had misinterpreted the expert report, this would still have absolutely no bearing on the impugned final decision, if we keep in mind that the RPD findings on the availability of state protection have not been seriously impugned and therefore stand. As a consequence, these findings constitute sufficient grounds, in themselves, to reject the applicant's claim.

VI. Conclusion

[27] It is not the role of this Court to substitute its own opinion for the conclusions of the RPD as the applicant is asking. The RPD has a definite advantage over this Court because of its expertise and of having heard the applicant. No one was in a better position to address the applicant's credibility and to weigh the evidence including the expert report and its effect on the applicant's story.

[28] In brief, and for all these reasons, the Court concludes that the impugned decision falls within a range of possible and acceptable outcomes which are justified in respect of the facts and the law, and therefore it deserves deference.

[29] Finally, the Court agrees with the parties that there is no serious question of general importance to certify.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application is dismissed.

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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