Federal Court  Cour fédérale

Date: 20090915

Docket: IMM-4210-08

Citation: 2009 FC 910

Ottawa, Ontario, September 15, 2009

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

JOAQUIN ROBERTO MEZA DELGADO
ELSA MARINA BERNAL DE MEZA
ELSA ALEJANDRA ARTEAGA ERNAL

Applicants

and

THE 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 (the Act), for judicial review of a decision of the Immigration and Refugee Board's Refugee Protection Division (RPD or Board), dated August 15, 2008, wherein the applicants were determined to be neither Convention refugees nor persons in need of protection.

[2] The applicants seek an order pursuant to subsection 18.1(3) of the *Federal Courts* Act, setting aside the decision of the Board, rejecting the applicants' claims and referring the matter back to a differently constituted panel for determination in accordance with such directions as the Court considers appropriate.

Background

[3] Joaquin Roberto Meza Delgado, Elsa Marina Bernal de Meza and Elsa Alejandra Arteaga Bernal (the applicants) are citizens of El Salvador. They claimed refugee protection in Canada on May 24, 2006.

[4] On September 21, 2007, the Minister of Public Safety and Emergency Preparedness (the Minister) filed his intent to participate in all aspects of the claims. The issue of exclusion under subsection 1F(b) of the Convention was raised by the Minister and added by the tribunal officer.

[5] Joaquin Roberto Meza Delgado, (the principal applicant), has served the Republic of El Salvador in many capacities. He was El Salvador's Ambassador to the United Nations, President of the Central Elections Council, Minister of Public Works, and Director of the Salvadoran Institute for Municipal Administration.

[6] The principal applicant opened the General Consulate of El Salvador in Vancouver, British Columbia on August 1, 2001 and served as General Consul until February 2006.

[7] In December 2004, the consulate's financial records were audited by the Court of Accounts, El Salvador's comptroller's office. The principal applicant was present for all but one of the three to four day audits. In January 2005, it was found that there were financial deficiencies in the consulate. The principal applicant sent a letter explaining the deficiencies to the Court of Accounts but did not receive a reply to his letter.

[8] On February 25, 2006 and on March 3, 2006, three newspaper articles appeared in San Salvador which accused the principal applicant of financial wrongdoing as General Consul of Vancouver. It is unclear who released the information to the media.

[9] Five weeks later, the Court of Accounts sent a formal report which outlined the financial irregularities found at the consulate in Vancouver. The principal applicant alleges that the accusations were politically motivated because they were published during the 2006 election campaign. Up until that time, nothing had been done by either the Ministry of Foreign Affairs or the Court of Accounts to remove the principal applicant from his position or to press charges against him.

[10] In support of this story, Antonio Cabarales, the principal applicant's brother-in-law and member of a think tank called Foundation for the Social Development of El Salvador, allegedly

received a phone call where he was told to stop accusing the Court of Accounts of corruption and politicization lest the principal applicant be implicated in criminality.

[11] The principal applicant has never been directly accused of any criminal wrongdoing or charged with any crime by the Attorney General in El Salvador through his work as General Consul. There have been no attempts to extradite the principal applicant.

[12] The allegations of financial misappropriation are related to the first half of the principal applicant's tenure from 2001 to 2004. The allegations derive from communications and documentary evidence presented to El Salvador's Foreign Ministry from Carmen Elena Rapalo de Orellana (the administrative assistant) who worked at the consulate during that time period.

[13] The principal applicant states that all allegations are false and borne from an acrimonious professional relationship where the administrative assistant wanted to replace him in his position.

[14] The Court of Accounts claimed that $60,000 US was misappropriated as follows:

1. Failing to remit approximately $12,000 US (and altering some of the receipts of service);

2. Overcharging approximately $900 CA from Salvadorans who had gone for consular services in Edmonton;

3. Misappropriating $49,000 US by misinforming El Salvador of the true rental cost of the consulate; and

4. Altering documents and overcharging Salvadorans for consular services.

[15] The principal applicant alleges that his life would be in danger if he returned to El Salvador. He alleges that he would not receive a fair trial and could be falsely imprisoned.

[16] The associated applicant, Elsa Marina Bernal de Meza (Elsa Marina) married the principal applicant on May 16, 2002.

[17] The second associated applicant, Elsa Alejandra Arteaga Bernal is the biological daughter of Elsa Marina but not of the principal applicant.

Board's Decision

[18] The Board found that the principal applicant was not excluded from refugee protection pursuant to Article 1F(b) of the Convention. More importantly, however, he further found that the applicants were not Convention refugees in that they do not have a well-founded fear of persecution for a Convention ground in El Salvador. He also found that they are not persons in need of protection as removal to El Salvador would not subject them to a risk to their lives or a risk of cruel and unusual treatment or punishment or torture.

[19] Since the issue of exclusion is not an issue in this application, I will only briefly summarize the Board's reasons for determining that the applicants were not excluded from a refugee determination.

[20] The Board found that the finding of exclusion turned on the credibility of the administrative assistant's testimony because all of the evidence on breach of trust and fraud originated with her. The Board found not only that she was not credible but also that she had an "animus" towards the principal applicant extending beyond her allegations of financial improprieties. The Board noted that the administrative assistant was not satisfied with making allegations to Salvadoran authorities that discredited the principal applicant personally and professionally, but that she also notified Citizen and Immigration Canada that the principal claimant and his wife were not political refugees, but thieves, and supplied it with voluminous evidence.

[21] The Board could not find that the principal claimant intentionally attempted to defraud El Salvador's public bursary and as such, there was no need to consider the corresponding Criminal Code violation or the related terms of imprisonment that determine whether a "serious non-political crime" had been committed under the Convention.

[22] In regard to the refugee protection analysis, the Board found that there was no evidence that "any particular person, political party, or shadowy figure has or will target the claimants for harm if they return to El Salvador" and that because of this, a section 97 claim was not "sustainable".

[23] The principal applicant alleged that the administrative assistant's allegations would be used to scandalize the principal applicant's political party in El Salvador in future parliamentary elections.

[24] The principal applicant alleged that he could be subject to malicious prosecution and prolonged detention if returned to El Salvador. The Board's response was that the trumped up charges that the principal applicant feared would have already been pursued by the Salvadoran government if it intended on charging him.

[25] The allegations were documented in the newspaper accounts in the spring of 2006 and the Board noted that a lot has happened since that time". The Board was not convinced that there was more than a mere possibility that criminal charges would be laid and as such, considered the fear of jailing or malicious prosecution to be unfounded. For instance, the Court of Accounts have completed their investigations and made determinations based on their findings. They exonerated the principal applicant of any wrong-doing in the second half of his tenure. For the first half, the Court of Account Report exonerated the principal applicant on some matters and made recommendations on others regarding reimbursement for claims against the consulate regarding paying employees for time worked and paying Salvadorans for sums that were overpaid.

[26] Despite these problems and the report being in the hands of Salvadoran authorities for anywhere from one to two and a half years, the principal applicant still had not been charged and efforts to extradite him back to El Salvador have never been pursued.

[27] The Board notes that if the Court of Accounts decided to pursue this matter now, they would be subjecting themselves to the same criticisms of the principal applicant's brother's organization, namely politicization and pursuing corruption only when it chooses. The Board found that the Attorney General is not interested in pursuing the matter.

[28] The Board also doubted that the Attorney General had any interest in pursuing the remaining issue of whether the principal applicant was receiving kickback funds from the rental of the consulate building. In any case, the Board found that it was a simple matter and not easily manipulated by the investigating authorities. In fact, the Board suggested that it is possible that a private investigation was conducted by the Attorney General and the principal applicant exonerated.

[29] The Board also reasoned that the principal applicant's fear of the possibility of extrajudicial execution by shadowy forces associated with the political interest who might want to silence the principal applicant was unwarranted. The Board found that there was less than a mere possibility that someone would want to assassinate the applicants as there was no motive to do so. The Board found that if the Court of Accounts were genuinely threatened by the criticisms of the principal applicant's brother and by extension himself, then the brother would be at risk. His brother, nevertheless, remains in El Salvador working for the same think tank and continues to be critical of the Court of Accounts. The Board also noted that the principal applicant, himself, could not identify anyone who would actually want to kill him or who would benefit from such an action, when asked repeatedly during the hearing.

[30] The Board found that the fears claimed by the applicants were more akin to legitimate fears during El Salvador's violent civil war. The evidence suggests that those fears are not objectively valid in today's El Salvador.

[31] In any case, the Board found that even if the principal applicant was charged and prosecuted, he would not be treated unfairly. This finding was based on the Constitution in El Salvador requiring a written warrant for an arrest and that a detainee has a right to a prompt judicial determination. The Board found that this was followed "generally" in practice. Further, the corruption that existed, as stated by the documentary evidence, was related to intimidation and killings of victims and witnesses rather than corruption related to false convictions.

[32] Finally, the Board stated that the resources available to the principal applicant in El Salvador due to his political and legal connections would protect against an unfair trial.

Issues

[33] The applicant raises the following issues:

1. Was the Board's finding that the Attorney General of El Salvador is not interested in pursuing a criminal prosecution of the principal applicant an unreasonable finding of fact made without regard to the evidence before it?

2. Was the Board's finding that the principal applicant would have a fair trial if he is criminally prosecuted in El Salvador an unreasonable finding of fact made without regard to the evidence before it?

3. Did the Board err in failing to consider the notarized affidavit of Salvador Nelson Garcia Cordova, given its importance as an expert opinion that directly contradicts the Board's conclusions on the principal applicant's risk of facing persecution through malicious and politically motivated prosecution?

[34] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board make an unreasonable finding of fact when it concluded that the Attorney General of El Salvador was not interested in pursuing a criminal prosecution of the principal applicant?

3. Did the Board make an unreasonable finding of fact without regard to the evidence before it when it concluded that the principal applicant would receive a fair trial if criminally prosecuted in El Salvador?

4. Did the Board err in failing to consider the notarized affidavit of Salvador Nelson Garcia Cordova as it contradicted the Board's findings?

Applicants' Submissions

[35] The applicants submit that the standard of review for questions of law remains correctness while other issues are reviewable on the standard of reasonableness in accordance with *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. Reasonableness requires justification, transparency and intelligibility in the decision-making process and is concerned with whether the decision falls within a range of acceptable outcomes, which are defensible in respect of facts and law.

[36] The applicants submit that there is no basis for finding that the Attorney General is not interested in pursuing prosecution. Just because the Attorney General has not pursued charges yet, does not mean that it will not do so in future. The principal applicant explains that one of the reasons that charges have not been pursued is because he has not returned to El Salvador.

[37] The applicants note that the Minister believes that the principal applicant faces persecution and has sought refugee protection to avoid it. The Board's decision contradicts the Minister's position and as such, is an unreasonable finding of fact. The real issue between the Minister and the principal applicant was whether the legal process the principal applicant would face would be fair or amount to persecution.

[38] The applicants also submit that the Board failed to understand the "highly politicized context" of the principal applicant's problems and that the investigations were commenced in the first place because the administrative assistant belonged to the same political party that controlled

the Ministry of Foreign Affairs that asked the Court of Accounts to audit the Vancouver consulate. This was done, at a politically opportunistic time, namely the year of an election and a full year after the allegations were brought to the attention of the Attorney General. There was also little doubt that the information that went to the media around that time originated with the Attorney General's office, as only it would have the itemized amounts included in the newspaper article. The principal applicant argues that the articles were fatal to his political career and that it was highly improper and unfair for the Attorney General's office to disclose the information.

[39] The applicants argue that the evidence shows that the principal applicant will not receive a fair trial. First, the Board has erred in its selective reading of the documentary evidence on the legal system in El Salvador. Second, it is precisely the principal applicant's political connections and his public record that put him at risk for the kind of problems noted in the US Department of State (DOS) Report. This report outlines problems of inefficiency, corruption and impunity, which undermine the respect for the judiciary and the rule of law.

[40] The applicants submit that the Board failed to understand how the documentary evidence relates to politically motivated prosecutions from the Attorney General and the corruption, lack of impartiality, and lack of judicial independence in such prosecutions. The documentary evidence regarding the denial of a fair public trial is more comprehensive than the Board lets on. The Attorney General's office has been accused of violating due process, not protecting Constitutional rights, not protecting life as well as numerous complaints by private citizens regarding irregularities and corruption by judges. The Board's finding that the targets of these problems were human rights

defenders was incorrect. The applicants argue that these concerns would apply to the principal applicant such that he would not receive a fair trial.

[41] The applicants also argue that the Board's findings were based on groundless speculation instead of the evidence of the principal applicant and Mr. Garcia Cordova. The affidavit of Mr. Salvador Nelson Garcia Cordova (Mr. Garcia Cordova) was not considered in the Board's decision. Mr. Garcia Cordova's credentials in the judiciary and legal community suggest that his opinion should have been referred to in the decision. Further, Mr. Garcia Cordova was currently representing other individuals similarly situated to the principal applicant which is why it is inexplicable that it was not referred to.

Respondent's Submissions

[42] The respondent submits that the applicants are asking this Court to reweigh the documentary evidence that was before the Board and to substitute its decision for that of the Board. It is well established that this Court should defer to the Board's findings if they are within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (see *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12).

[43] The written reasons by the Board are detailed and provide the evidentiary foundation for the Board's findings of fact regarding the Attorney General and Court of Accounts and their interest in pursuing the principal applicant.

[44] The respondent submits that the Board's reasoning that the Attorney General is not interested in pursuing the principal applicant is reasonable. As well, the issue regarding rental kickbacks is easily provable and if they were interested in pursuing this matter, they could do so.

[45] The Board also detailed an evidentiary foundation for the finding that if charged, the principal applicant would receive a fair trial. The principal applicant did not provide any objective evidence that individuals in El Salvador are deliberately convicted for crimes they did not commit.

[46] The Board's findings on the Salvadoran criminal justice system, including the finding that individuals are presumed innocent, are protected from self-incrimination, that they have a right to a public hearing, to be in court, to question witnesses and to present witnesses and evidence, each support the Board's findings that the principal applicant would most likely receive a fair trial. In addition, the Board found this was even more likely the case given the principal applicant's political and legal connections.

[47] There is also no merit to the applicants' allegations that the Board ignored evidence that directly contradicted the Board's findings. The document from Mr. Garcia Cordova to which the applicants refer simply did not outline or provide meaningful, objective evidence of risk to the applicants. The document stated that the principal applicant is a victim of political persecution but there was no concrete evidence of who the agent of this persecution was, and what specific persecutory events had occurred.

[48] In any case, the Board is not required to mention every document in its written reasons as it is presumed to have considered all of the evidence before it (see *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.)).

[49] The respondent submits that the onus is on the applicants to provide clear and convincing proof that the claim for refugee status is well-founded, and in this case the onus to discharge was not met.

[50] In conclusion, the Board is the finder of fact and the respondent submits that the reasons should not be interfered with lightly. The inferences and conclusions by the Board were reasonable and the applicants have not demonstrated that "no reasonable person could, from the evidence before the Refugee Division, have arrived at this finding".

Analysis and Decision

[51] **Issue 1**

What is the standard of review?

Dunsmuir above, explains that if previous jurisprudence has determined the standard of review to be applied in a given situation, then further analysis is not necessary. An administrative tribunal is owed considerable deference in relation to its factual findings. As a result, the appropriate standard of review of such findings has in the past been found to be patent unreasonableness (see *Ranjha v. Canada (Minister of Citizenship and Immigration)* (2004), 43 Imm. L.R. (3d) 116 at

paragraph 19). Following the decision in *Dunsmuir* above, this standard is now expressed simply as reasonableness (see *Dunsmuir* above, at paragraph 45). Issue two is a question of fact to which the standard of reasonableness should apply.

[52] Whether the Board has reached a factual finding without regard to the evidence before it is likewise a question of fact to which the standard of reasonableness should apply. Thus, I conclude that reasonableness is the appropriate standard of issues three and four also.

[53] **Issue 2**

Did the Board make an unreasonable finding of fact when it concluded that the Attorney General of El Salvador was not interested in pursuing a criminal prosecution of the principal applicant?

As observed above, the Supreme Court in *Dunsmuir* expressed the need for justification within the decision-making process. The Board's reasons on this issue fail to meet this standard. The failure of a government body to act in a given way in the past cannot itself support the conclusion that this body will not alter course in the future. Additional evidence is required.

[54] While the Attorney General may not as yet have attempted to prosecute the principal applicant, the Board appears to have accepted that there were still certain matters before the Attorney General that had yet to be resolved. There does not appear to be any rational basis upon which the Board could reasonably conclude that the Attorney General's failure to prosecute the principal applicant to this point means that it would not still attempt to do so in the future.

Consequently, I find that the Board's decision in this respect fails to meet the standard of reasonableness.

[55] **Issue 3**

Did the Board make an unreasonable finding of fact without regard to the evidence before it when it concluded that the principal applicant would receive a fair trial if criminally prosecuted in El Salvador?

As an initial observation, I am unable to discern the basis upon which the Board has concluded that the principal applicant's apparent connections within the Salvadoran legal community would ensure that he would receive a fair trial.

[56] Turning to the heart of the issue, it is certainly the case that the information contained within the documentary evidence may often present conflicting views of the situation in a country. In those instances, it is for the Board to weigh this evidence and to decide one way or the other as to which evidence it will prefer. So long as the Board provides a rational basis for its conclusion, its decision may be said to be reasonable. However, such cannot be the case when the Board simply ignores the contradictory evidence and reaches a finding absent proper consideration of it.

[57] The Board concluded that those problems with the judicial system that were noted in the DOS report would not impact on the principal applicant's ability to receive a fair trial because "these concerns would not be present in a criminal proceeding…".

[58] The Board's conclusion is contradicted by the evidence not specifically analyzed, for example, that which noted the numerous incidents in which the Attorney General's office had prevented access to justice, violated due process or otherwise failed to fulfill its duties.

[59] It is well-established that the Board need not make reference to every piece of evidence put before it. That having been said, it is equally well established that the more important the evidence that is not mentioned or analyzed, the greater the presumption that the Board made an erroneous finding of fact (see *Cepeda-Gutierrez et al. v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 at paragraph 17).

[60] I find that this presumption is applicable in the present case. The DOS report contained certain statements that called into question the veracity of the Board's conclusions. It was not open to the Board to reach those conclusions absent proper consideration of this evidence.

[61] **Issue 4**

Did the Board err in failing to consider the notarized affidavit of Salvador Nelson Garcia Cordova as it contradicted the Board's findings?

For the reasons described in Issue 3 above, I find that the Board's failure to properly analyze the evidence contained within the affidavit of Mr. Garcia Cordova leads me to the conclusion that the Board has reached a decision without regard to the evidence before it.

[62] In this affidavit, Mr. Garcia Cordova provides his professional opinion as to the likelihood that the principal applicant could be prosecuted for purely political reasons. While the respondent argues that the fact that the Board cited this affidavit in the footnotes to its decision is evidence that it considered it, I find that this action alone is insufficient to satisfy the Board's requirement to properly analyze the contents of the affidavit insofar as it contradicts its findings.

[63] The application for judicial review is therefore allowed and the matter is referred to a differently constituted panel of the Board for redetermination.

[64] Neither party wished to propose a serious question of general importance for my consideration for certification.

JUDGMENT

[65] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a differently 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	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

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STYLE OF CAUSE:	JOAQUIN ROBERTO MEZA DELGADO ELSA MARINA BERNAL DE MEZA ELSA ALEJANDRA ARTEAGA BERNAL - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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