Federal Court

Cour fédérale

Date: 20100301

Docket: IMM-4136-09

Citation: 2010 FC 237

Ottawa, Ontario, March 1, 2010

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

JOSE BENITE MIRANDA GOMEZ
LYNETTE DEL ROSARIO ARGENAL URTECHO
JOSELYNN ALISSA MIRANDA
JOSE DAVID MIRANDA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are a family unit: the father, Jose Gomez, the mother, Lynette Urtecho, both citizens of Nicaragua, and the children Joselynn age 5 and Jose David age 2, both dual citizens of Nicaragua and the United States.

[2] They challenge the June 9, 2009 decision of a member of the Refugee Protection Division (the tribunal) determining the applicants were not Convention refugees or persons in need of protection. This finding was based on its assessment of the documentary evidence from which it concluded they had not objectively established a well-founded fear of persecution if returned to Nicaragua. The applicants' credibility is not a factor in the decision.

[3] The applicants raise three issues in their challenge to the tribunal's decision: (1) it ignored substantial recent documentary evidence on the behaviour of their persecutor, the Sandinista National Liberation Front (FSLN), headed by Daniel Ortega. In 2006, Mr. Ortega was elected President and the FSLN became the majority party in the National Assembly; (2) it did not properly apply the similarly situated test as it did not analyse the shared characteristics of those critical of the FSLN; and, (3) it erred in law in excluding the children under section 1E of the Refugee Convention.

I. Facts

[4] The applicants' claim is derived from Mr. Gomez's Personal Information Form (PIF) in which he recites the following.

[5] In 2002, he was chosen by his classmates and school faculty to be a student leader at his university, the Polytechnical University of Nicaragua (UPOLI), and later chosen to be part of UPOLI's team in the Nicaraguan National Student League (UNEN).

[6] His problems began in April/May 2004 when he learned other student leaders at various universities in Nicaragua were receiving money from the FSLN in return for carrying "FSLN banners and spreading FSLN propaganda in other ways, such as over the radio, pamphlets etc." He and three other student leaders were firmly opposed to this as the duties of the student leaders were to serve the best interests of the students to ensure six percent (6%) of the national yearly budget was allocated to the universities "as it was supposed to be, not to serve the interests of any particular political party or parties." His opposition caused friction with other student leaders at UPOLI and in the UNEN, and specifically, with Jasser Martinez, the main leader at UNEN who belonged to the FSLN or supported it and was said to be mixing politics with the student movement.

[7] At the end of May 2004, at a student leaders' meeting held at UPOLI, he openly refused to support any political party which led to "verbal confrontations with most of the other student leaders. I threatened to expose their practices of manipulating the student associations for political ends."

[8] Mr. Gomez then writes: "from that moment on I was harassed by UNEN leaders". On August 9, 2004, he and three other leaders: "who opposed FSLN involvement were removed from our positions as student leaders at UPOLI, and the UNEN President Jasser Martinez. I repeated my threat to expose their practices."

[9] He writes the same week he received threats from students close to Mr. Martinez. He was told not to talk and to forget what he had learned or his family and he would suffer.

[10] On or about November 9, 2004, at a large rally of more than 2000 students from different universities, he publicly denounced the UNEN and the FSLN for using students for their own benefit. He was forcibly removed from the stage by FSLN supporters. He writes: "if the three other expelled students had not been with me I believe I would have been seriously harmed."

[11] He says for weeks afterwards he was followed by two or four men clearly not students "following me almost everywhere I went." He suspected them to be "former members of the state security system now working for the FSLN."

[12] On December 3, 2004, he was shot at but narrowly escaped by rushing into his home. He and his wife filed a complaint against the UNEN and FSLN for the attack. He indicates the police came to his house to investigate "but to date nothing has been uncovered" [and] "I suspect that the police had not, or had not properly, conducted an investigation because of FSLN influence over them."

[13] A week later, the family moved out to stay in a remote rural area without proper medical assistance for Lynette's pregnancy.

[14] Mr. Gomez recounts obtaining visas to Mexico and to the U.S. where his wife's sister resided. They left Nicaragua in February 2005, stayed in Mexico a month, arrived in the U.S. in March 2005 but did not make a refugee claim: "because we were unaware that we could make them." They were sponsored by his wife's sister but felt at risk because of the length of time it would take to obtain status and the U.S. Immigration authorities were becoming more aggressive in

removing non-status residents. They examined their options - going to Mexico and staying in the U.S. was not feasible. They entered Canada in September 2007 after having contacted Lynette's brother, a Canadian citizen.

[15] If returned to Nicaragua they fear: "we will be seriously harmed or perhaps even killed" by the FSLN, its supporters and/or the authorities. "As the FSLN is now the party in power, their control extends to the police, army, the judiciary, everything. Consequently we would not be able to obtain protection or find safety anywhere in the country."

II. The tribunal's Decision

[16] Prior to embarking on its analysis of the documentary evidence, the tribunal commented on the events the applicants had described. In particular, it emphasized the December 3, 2004 shooting on which they made a denunciation to the police which was investigated later that evening, but did not result in finding any suspects. The tribunal found Mr. Gomez's allegation the FSLN and Mr. Martinez were behind the attack to be speculative and not supported by the evidence and the applicants' complaint the investigation was flawed because of political interference by the FSLN be unfounded.

[17] The tribunal's documentary evidence analysis was mostly based on US DOS reports on Nicaragua for the period 2004 to 2008 which, as it noted, included two years when Mr. Ortega was President after the 2006 election returned him to power and the FSLN held the most seats in the National Assembly but not a majority. From these reports for that period, the tribunal drew the following findings:

(1) The evidence shows that: “the situation in general may be one of ‘deteriorating democracy’, the violation of some human rights and attacks on some human rights workers” [adding] ”What the evidence does not show is that the Sandinistas, or Jasser Martinez, are engaged in vendettas against people who opposed them prior to their election to power in 2006.”

(2) The government or its agents did not commit any politically motivated killings or disappearances, information which has not been suppressed by the Nicaraguan government since NGO’s, outside groups, generally are at liberty to report without constraint or limits on publication.

(3) While employees of human rights organizations in Nicaragua have received anonymous death threats and accusations of being CIA agents or traitors, there have been no reports of anyone actually harming such groups. On a balance of probabilities based on evidence of this experience, there is no evidence that being labelled as traitors or CIA agents would put the claimants at risk of their lives.

(4) There was a death threat against several journalists from a group of FSLN supporters. This occurred in October 2006 in a pre-election campaign. There is no report they were harmed. Each filed complaints with the Public Ministry.

(5) "There is evidence that some of the current opponents of the Sandinista regime today have been subjected to violent attacks and death threats." Example: the ex-Vice-Chancellor of Nicaragua, Members of the Permanent Human Rights Commission and of two individuals who are associated with a political party which opposes the Sandinistas. "However, on a balance of probabilities, there is no basis in the evidence for finding these are persons similarly situated to the principal claimant". [My emphasis]

(6) There was a murder in 2004 of a journalist, a former Sandinista militant who broke away from Mr. Ortega and the FSLN and was well known for denigrating the FSLN. His murderer was tried and convicted. The evidence pointed to his having acted alone and no political motivation was established. The tribunal found in any event, even if such a link had been established, it would not assist the applicants' case. "The claimant does not have a high profile in Nicaragua. In fact [he] was not directly involved in politics and had no party affiliation. Apart from [his] activities as a student leader within UNEN for UPOLI, there is no evidence that he had made a presence for himself on the local or national level." [My emphasis]

[18] The tribunal noted in addition to his years as a student, Mr. Gomez worked as an assistant auditor in the local office of a well-known international accounting firm and had no other work experience. The tribunal repeated its finding he was not a political party activist in Nicaragua. It concluded:

> There is no reason, on a balance of probabilities, to suppose that he would, upon return to Nicaragua, become a human rights worker, or a journalist, or a political party activist, the professions or occupations which have been targeted currently. To suppose that the

> claimant will take up such a profession, or occupation, in the absence of evidence, would be speculation.

[19] Finally, the tribunal noted Mr. Gomez's testimony indicating he would return to his studies should he return to Nicaragua and would wish to be involved in student politics acting in the best interests of students and without political affiliation. The tribunal found:

> …Country documents do indicate that student politics remains politicized in Nicaragua but there is no indication that student leaders have been subject to more than a mere possibility of persecution, or a risk to life, or of cruel and unusual treatment or punishment, or a danger of torture.

[20] It expressed its overall conclusion this way:

> Based on the particular circumstances of the principal claimant, the panel can not find that there is more than a mere possibility that anyone will injure the claimant for being somehow a threat to the Sandinistas. Therefore, the claimant has not proved the objective basis of his claim, under either section 96 or section 97 of the *Act*.

III. The Applicants' Arguments

A. *Ignoring the Evidence*

[21] In the applicants' view, the proper question to be asked by the tribunal is, given Mr. Gomez's experience as a student leader opposed to the FSLN's infiltration of the student movement, whether there is evidence, if returned to Nicaragua, he would be perceived by the FSLN to be an opponent of their regime, and whether persons in Nicaragua are harmed because of their perceived opposition. His answer is a resounding yes.

[22] Counsel for the applicants points to documentary evidence which establishes, that since Mr. Ortega's return to power as President, matters have deteriorated. He is the head of the

Sandinista movement and the FSLN is the largest party in the National Assembly. He submits documentary evidence establishes "the judiciary remains dominated by FSLN appointees and is used by it for political purposes."

[23] Counsel for the applicants points to documentary evidence the FSLN had created, in November 2007, a parallel power structure to traditional institutions – Citizen Power Councils (CPCs) under the control of the executive branch. The CPCs are operated from local FSLN offices and are chaired by local FSLN secretaries. The government administers government benefits through the CPCs. They control employment opportunities through required letters of recommendation from CPCs block captains. The applicants assert through the CPCs the government is coercing its citizens into FSLN membership.

[24] The documentary evidence establishes, counsel for the applicants submits, the FSLN has orchestrated mob violence and vigilante attacks against opposition supporters. Police are ordered not to interfere with the attacks or arrest those who are engaged in pro-government violence. Contrary to the tribunal's findings, there is evidence from human rights groups that police have been ordered to use excessive force against those who peacefully protest against the government and NGOs and their employees have been subjected to smear campaigns, death threats and have encountered numerous government restrictions in their work. Journalists and radio stations have also been intimidated, slandered and attacked.

[25] Nor are student politics immune from FSLN's influence and manipulation. Counsel for the applicants points to documentary evidence that in June 2008 a group of pro-government students

blocked the entrance to an auditorium at a university where a forum was taking place on the country's political situation. Documentary evidence establishes that in October 2008 FSLN sympathizers attempted to seize control of the campus at another university in Nicaragua and threatened to use their influence to cancel that institution's six percent (6%) national budget entitlement after the President's wife discovered a poll released by the university revealed the government was losing popularity and would lose several key municipal elections. In December 2008, there were clashes at Mr. Gomez's former university when students protested proposed reforms which would allow the pro-FSLN UNEN president to remain in power after 15 years. The UNEN has been described as the "muscle power" of the FSLN.

[26] Counsel for the applicants argues this documentary evidence, which was ignored by the tribunal, supports his proposition that Mr. Gomez is similarly situated to those who have suffered abuses at the hands of the FSLN and its supporters for simply opposing the FSLN. Ordinary citizens have been threatened and harmed by the FSLN not just high profile politicians, NGO's and journalists. He submits the RPD's analysis ignored the present political realities in Nicaragua.

B. *The similar situation argument*

[27] At the hearing, counsel for the applicants argued the tribunal had erred in analysing the documentary evidence in terms of what happens today to people who are critical or opponents of the FSLN. He argued not only the high profile persons are at risk but ordinary civilians who oppose the FSLN. In other words, counsel argued there was a fundamental transformation for the worse going in Nicaragua.

C. *The Section 1E Argument*

[28] The applicants admit their children are citizens of the United States having been born there. However, the problem is the parents are not. Before excluding them, the tribunal was required to consider what risks the children would face if returned to the United States without their parents which would be contrary to their best interests.

IV. <u>The Standard of Review</u>

[29] There is no dispute between the parties the issue whether the tribunal properly interpreted the evidence is a question of fact which requires a standard of review of reasonableness, both parties citing the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47. Mention should also be made to the more recent Supreme Court of Canada's decision in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at paragraph 46 where Justice Binnie stated paragraph 18.1(4)(d) of the *Federal Courts Act* signalled Parliament's intention that administrative fact-finding is to command a high degree of deference, a view quite consistent with *Dunsmuir*, in his opinion.

[30] In terms of the Section 1E argument, the parties differ. The applicants submit that the question raised – ignoring the best interests of the children – raises a question of law to be decided on the standard of correctness while counsel for the respondent submits the question was decided on factual considerations calling for the reasonableness standard. In my view, the question whether the tribunal applied the correct test or failed to take into account relevant considerations, is a legal question and is reviewable on the basis of correctness.

V. Analysis and Conclusions

(1) The Ignoring the Evidence Argument

[31] The applicants' principal attack is based on paragraph 18.1(4)(d) of the *Federal Courts Act* which authorizes this Court to quash a decision of a federal tribunal if the Court satisfied the tribunal "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the evidence."

[32] The question becomes: How do the applicants and the Courts determine whether a tribunal made its decision "without regard to the evidence" i.e. ignoring the documentary evidence?

[33] As argued by counsel for the respondent, the jurisprudence is clear this Court cannot reweigh the evidence nor substitute its views of the facts for that of the tribunal whose findings command substantial deference. It cannot read a decision miscroscopically but must do as a whole.

[34] The leading case on this issue is the decision of Justice Evans, then of this Court, in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, (1998) 157 F.T.R. 35 after writing that:

> […] in order to attract judicial intervention [under this paragraph of the *Federal Courts Act*], the applicant must satisfy the Court, not only that the Board made a palpably erroneous finding of material fact, but also that the finding was made "without regard to the evidence": […]

[35] He sets out the following considerations at paragraphs 15 to 18 of his decision:

> **15** The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency. Just as a court will only defer to an agency's interpretation of its constituent statute if it provides reasons for its conclusion, so a court will be reluctant to defer to an agency's factual determinations in the absence of express findings, and an analysis of the evidence that shows how the agency reached its result.
>
> **16** On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court *(Medina v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.)). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.
>
> **17** However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact. [Emphasis mine.]

[36] I examined all of the numerous extracts from the documentary evidence, counsel for the applicants referred to as the evidence which was not considered or was misconstrued. With respect,

I cannot agree with his vision. When the decision is read as a whole, there is no doubt the tribunal was aware there had been a "deterioration of democracy" since 2007. The extracts, submitted to me for review by the applicants' counsel, support this conclusion of deterioration. However, these extracts do not contradict any of the documentary evidence relied on by the tribunal to support its findings and counsel for the applicants could point to none. The documentary evidence reviewed by the applicants' counsel does show abuses and denial of benefits but also shows there is a functioning judiciary and functioning police force and, in any event, substantiates the principal applicant's profile not being at risk.

<u>The substantially situated argument</u>

[37] I agree with counsel for the respondent there is no factual basis for the applicants' argument the tribunal did not properly assess the evidence in respect of similar situated persons critical of the FSLN. It examined the principal applicant's own personal circumstances and risk against the documentary evidence which showed there were no politically motivated killings and no vendettas against past opponents. The tribunal specifically found some current opponents to the FSLN <u>today</u> have been subjected to violent attacks but determined he was not similarly situated. Based on the evidence, this finding was reasonably open to the tribunal. I am not entitled to re-weigh the evidence.

[38] The applicants have not satisfied me the tribunal ignored the evidence.

The Article 1E argument

[39] Since the children are U.S. citizens who could obtain protection from that country and no evidence was led they would be at risk there, the tribunal, in a separate finding, found they had not made out a case of need of protection. Counsel for the applicants argues the tribunal erred it is plain from the evidence that, as their parents did not have status in the U.S., the children would only be returned to that country as unaccompanied minors which would clearly not be in their best interests. Counsel argues the tribunal had an obligation to consider whether these facts on their own would be sufficient to support the minor claim against the United States – take into account their best interests. Counsel for the respondent argues the tribunal's finding is they were not refugees – a case of non inclusion. It did not exclude the children which is the focus of Article 1E of the Convention. I agree.

[40] With respect, I cannot accept this argument for the following reasons: First, as held by the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, the fundamental principle in refugee law is that international refugee protection is to serve as "surrogate protection" and a well founded fear of persecution must be established in respect of each country of citizenship before it can be sought from another country. This is clear from the wording of sections 96 and 97 of IRPA. This principle, in the case of the children here, has nothing to do with Article 1E of the Convention (see *Jian Mai et al v. the Minister of Citizenship and Immigration*, 2010 FC 192). The Federal Court of Appeal's decision in *Williams v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 126 makes this clear. Second, the applicants led no evidence of risk within the meaning of sections 96 and 97 against the United States. The children's claims could not but fail. Third, it would be improper and pure speculation for a tribunal to decide a case for need for

protection on the mere fact of potential separation and, in any event, IRPA contains statutory provisions such as section 25 to consider the children's best interests (see *Varga v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394 at paragraph 13.) This argument must fail.

[41] For these reasons this judicial review application is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is dismissed. No question of general importance was suggested.

"François Lemieux"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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