Federal Court  Cour fédérale

Date: 20100415

Docket: IMM-4428-09

Citation: 2010 FC 410

Ottawa, Ontario, April 15, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

CATHERINE RESTREPO MEJIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for the judicial review of the decision (the decision) of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated August 14, 2009, wherein the Board determined that the Applicant was not a Convention refugee and not a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, R.S. 2001, c. 27 (*IRPA*).

[2] For the reasons set out below the application is dismissed.

I. Background

[3] The Applicant is a 23 year old citizen of Columbia. She arrived in Canada on March 2, 2007, on a visitor's visa and made a claim for protection on August 27, 2007. The Applicant's claim for refugee protection is based upon her fear of persecution by the Revolutionary Armed Forces of Columbia (FARC).

[4] In 2007 the Applicant was a communications student in Columbia. The Applicant was to travel with fellow students to Panama to work on a school project. According to the Applicant, a member of the group, "Sergio", decided not to go as he had received a warning from members of FARC against the project. While in Panama, the Applicant learned from her mother that Sergio had disappeared. Upon her return, the Applicant's mother told her that she had received a threatening phone call from FARC asking for the Applicant. The Applicant relocated to live with an Uncle. In February, she was issued a visa to visit family in Canada. While in Canada, the Applicant states that her mother received a second threatening phone call from FARC.

[5] The Board was not persuaded that, on a balance of probabilities, there existed an objective basis for the Applicant's fear and that if she returned to Columbia she would not face a reasonable chance of harm or persecution. The Board did not find the Applicant's story to be credible as to the well-foundedness of her fear and held that it was hard to believe that FARC was after her or that they would still be interested in her if she returned. The Board noted that there was no documentary proof that the Applicant had been targeted by FARC. The Board specifically stated that while the

lack of documentary evidence was not fatal by itself, it drew a negative inference from it. The Board combined this negative inference with the Applicant's testimony and determined that the Applicant was not targeted by FARC.

II. Issues and Standard of Review

[6] The issues raised by the Applicant can be summarized as follows:

a) Did the Board misunderstand the nature of the test or onus imposed by the definition of a Convention refugee?

b) Did the Board base its conclusions on speculation, conjecture and make an adverse finding that was based on no evidence?

c) Did the tribunal fail to exercise its jurisdiction to consider the Applicant's claim for protection in accordance with subsection 97(1) of *IRPA*?

[7] At the hearing, Counsel for the Applicant submitted a late affidavit, on consent, that sought to shift the basis for the Applicant's claim toward the Applicant being a female university student as opposed to being specifically targeted by FARC. However, this did not significantly change the dynamic of this case as the Applicant did not take this focus at her refugee hearing.

[8] Issues a) and b) will be assessed on a standard of reasonableness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12; [2009] 1 S.C.R. 339). The Court is to demonstrate significant deference to Board decisions with regard to issues of credibility and the assessment of evidence (see *Camara v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 362; [2008] F.C.J. No. 442 at paragraph 12).

[9] Issue c) is a question of law and will be assessed on a standard of correctness (*Plancher v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1283; [2007] F.C.J. No. 1654).

III. Analysis

A. *Did the Board Misunderstand the Nature of the Test or Onus Imposed by the Definition of a Convention Refugee?*

[10] The Applicant argues that the Board imposed too great an onus on the Applicant to establish her claim as none of the allegations were inherently lacking in credibility but the Board found that the allegations lacked corroboration, proof or "definitive proof" (see *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680; 57 D.L.R. (4th) 153 (F.C.A.). The Applicant argues that if she had been asked to provide documentary or independent evidence then she could have addressed this issue.

[11] The Respondent argues that it is the claimant's responsibility to introduce into evidence all the material which may be essential to establish their claim as well-founded, relying on *Rahmatizadeh v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 578; 48 A.C.W.S. (3d) 1427.

[12] In this case, the Board's concern with the lack of documentary proof was only one element of its overall credibility finding. The Board found that the Applicant's claim was lacking in credibility, that the Applicant had provided generalized and embellished testimony, and also noted that there was no documentary evidence to support the story. As set out in paragraphs 8 to 12 of the decision, it was reasonable for the Board, based on the evidence provided by the Applicant, to find that she did not have a well founded fear. It was up to the Applicant to introduce into evidence all the material to establish that her claim was well-founded and a lack of relevant documents can be a valid consideration for the purpose of assessing credibility.

[13] I also note that when an applicant swears to the truth of certain allegations, this creates a presumption that the allegations are true unless there are valid reasons to doubt their truthfulness (see *Permaul v. Canada (Minister of Employment and Immigration)*, [1983] F.C.J. No. 1082; 53 N.R. 323 (F.C.A.)). On this record there were valid reasons raised by the Board, such as the Applicant's generalizations and embellishments, to doubt the truthfulness of her claim.

B. *Did the Board Base its Conclusions on Speculation, Conjecture and Make an Adverse Finding that was Based on No Evidence?*

[14] The Applicant argues that the Board speculated unreasonably in drawing its conclusion that the agents of persecution could have been some group or individuals other than FARC and that the Board had no good reason to doubt the Applicant's evidence. The Applicant also submits that the Board's statements of how FARC "usually" acts were not based in the evidence and had a negative influence over the Board. The Applicant argues that implausibility findings should be made in only the clearest of cases, relying on *Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776; 208 F.T.R. 267.

[15] The Respondent argues that the Applicant's argument should be given no weight.

[16] Any weakness that may have been caused by the Board's statements did not result in the decision, as a whole, being unreasonable (see *Ogiriki v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 420; 2006 FC 342 at paragraph 13; *Miranda v. Canada (Minister of Employment and Immigration)*, 63 F.T.R. 81; [1993] F.C.J. No. 437). It is clear that the Board based the decision on the totality of the evidence, and not this one point.

[17] In this case, the Board determined that the facts, as advanced by the Applicant, were outside the realm of what could reasonably be expected, and that the Applicant did not provide documentary evidence to support her claim. The Board is a specialized tribunal and has the ability to determine the weight to be assigned various pieces of evidence. This Court has noted the

"presumption" that a claimant's sworn testimony is true is always rebuttable, and, in appropriate circumstances, may be rebutted by the failure of the documentary evidence to mention what one would normally expect it to mention (see *Adu v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 114; 53 A.C.W.S. (3d) 158 (F.C.A.)). The Court's role is not to re-weigh the evidence, but to determine if the decision is reasonable and in this case the Board's decision was reasonable.

C. *Did the Tribunal Fail to Exercise its Jurisdiction to Consider the Applicant's Claim for Protection in Accordance with Subsection 97(1) of IRPA?*

[18] The Applicant argues that the Board's references to subsection 97(1) in the first and final paragraphs of the reasons did not discharge its responsibility to conduct a separate analysis for subsection 97(1).

[19] Under subsection 97(1) of the *IRPA*, the Board must assess whether a refugee claimant is in need of protection for reasons of potential death, torture, or cruel and unusual treatment or punishment.

[20] A negative credibility finding in relation to section 96 will often obviate the need to consider section 97 (see *Emamgongo v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 208; [2010] F.C.J. No. 244; *Plancher*, above). In *Plancher*, Justice Michel Beaudry set the principle out as such:

> 17 In the present case, the Board concluded that there was a lack of credibility on the part of the applicant, and as such, the member did not believe that there was a serious risk of torture, risk to the applicants' lives or a risk of cruel and unusual treatment or punishment if they were to return to Haiti. If a claimant has been found not credible, the Board is not required to perform a separate analysis. This was confirmed in *Kaur v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 2112 (QL), 2005 FC 1710, at para.16:
>
> > With respect to the lack of a distinct analysis regarding subsection 97(1), the Board was entirely justified not to undertake that exercise from the moment where it determined that the applicant was not credible. If the Board was correct on that point, it is clear that the applicant could not have been considered to be a person in need of protection. Incidentally, that is what this Court has determined on numerous occasions: *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1540; 2003 FC 1211 (QL); *Soleimanian v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 2013; 2004 FC 1660 (QL); *Brovina v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 771, 2004 FC 635 (QL).

[21] I am satisfied that the Board's findings regarding the credibility of the principal Applicant in relation to her experiences and those of her husband in Colombo were reasonably open to it. In this case, the credibility findings are dispositive of the question of whether the Board’s assessment of the Applicant’s claim to be a person in need to protection under subsection 97(1) is sustainable. While

the linkage was not specifically set out in the reasons, I am satisfied that the linkage is implicit in the reasoning (see *Kulendrarajah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 79; 245 F.T.R. 145, at paragraph 12).

[22] In this matter, the Applicant advanced her claim based on her fear of FARC, not on her identity as a female student with journalistic and community interests. The Board cannot be faulted for not addressing issues not advanced by the Applicant (*Emamgongo*, above).

[23] I have already found that the decision was reasonable and, in this case, the credibility findings are dispositive of the question of whether the Board's assessment of the Applicant's claim under subsection 97(1) is sustainable. While a more extensive explanation for the Board's conclusion regarding "person in need of protection" in relation to the principal Applicant might well have been desirable, I am satisfied that its absence does not constitute reviewable error.

[24] No question to be certified was proposed and none arose.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. this application is dismissed; and

2. there is no order as to costs.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-4428-09**
STYLE OF CAUSE:	**MEJIA v. MCI**
PLACE OF HEARING:	**APRIL 7, 2010**
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