Federal Court		Cour fédérale

Date: 20100330

Docket: IMM-4450-09

Citation: 2010 FC 345

Ottawa, Ontario, March 30, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

FRANKLIN ANTONIO PEREZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated August 20, 2009, wherein the Board found the applicant not to be a Convention refugee nor a person in need of protection under section 96 or 97 of the Act.

Factual Background

[2] The applicant, Franklin Antonio Perez, was born and raised in Honduras. In 2003, the applicant had several encounters with a gang known as Mara Salvatrucha 13.

[3] The applicant was involved in three incidents with several gang members. During the first incident on February 15, 2003, the applicant alleges that several gang members approached him and demanded that he get a tattoo and buy certain types of clothing in order to join them. They also beat him and robbed him. In the following days, the applicant did not comply with their directions.

[4] In the second incident on February 24, 2003, a group of gang members accosted the applicant and beat him. They said he had to join the gang.

[5] On the third occasion on March 4, 2003, two gang members shot the applicant on the street and a bullet grazed his knee.

[6] The applicant went to the police on February 24 and on March 4, 2003 and copies of the police reports were filed. After the third incident on March 4, 2003, the police told the applicant they would try to investigate but they made no promises because they had insufficient resources.

[7] The applicant sought medical treatment after the second and third incidents and copies of medical certificates dated February 24 and March 4, 2003 were filed.

[8] On April 1, 2003, neighbours and friends told the applicant's mother that gang members were asking for someone of his description in the neighbourhood. The applicant hid in a local church for several days and then left Honduras, heading north. He arrived in the United States in May 2003 where he stayed until coming to Canada on June 1, 2008.

[9] The applicant filed a refugee claim the next day after arriving in Canada on the basis that he feared persecution by reason of his membership in a particular social group and that he faced a risk to his life or of cruel and unusual treatment or punishment in the Republic of Honduras.

[10] While in the United States, the applicant did not seek asylum. The applicant states in his Personal Information Form (PIF) that he did not know that he could make such a claim. While in the United States, the applicant made several unsuccessful applications under the Temporary Protected Status (TPS) Program and he was finally asked to stop submitting any further applications.

[11] The TPS Program is a program granting temporary immigration status to eligible nationals of designated countries. Temporary protected status is granted to foreign nationals who are temporarily unable to safely return to their home country because of ongoing armed conflict, an environmental disaster or other extraordinary and temporary conditions. A person who is acknowledged as a TPS may remain in the United States and may obtain a work authorization, but this status does not lead to permanent resident status.

[12] The applicant chose to attempt to be acknowledged as a beneficiary under the TPS Program. It is known that the asylum process in the United States is difficult and claimants are frequently returned to their home country. The applicant was afraid he would be sent back to Honduras.

[13] At the hearing, the applicant filed various material concerning the TPS Program, including a decision of the "Administrative Appeals Office" dated August 24, 2007, which states, among other things:

> The applicant's motion to re-open consists of forwarding a copy of his passport and documentation relating to his claim of continuous residence since December 30, 1998, and continuous physical presence since January 5, 1999, in the United States.

[14] One of the necessary conditions of the TPS Program is continuous physical presence and continuous residence in the United States. After numerous application attempts by the applicant, he was informed that because he was not continuously a resident in the United States since December 30, 1998, or continuously physically present in the United States since January 5, 1999, he did not qualify under the program.

Impugned Decision

[15] The determinative issues in this case were the applicant's credibility, subjective fear and whether the applicant faced a generalized risk.

[16] Regarding the applicant's credibility, the Board rejected his explanation regarding the delay to claim refugee status, more particularly his failure to claim asylum in the United States. Based on

the decision of the Administrative Appeals Office in the United States, the applicant made an application relating to “his claim of continuous residence since December 30, 1998, and continuous physical presence since January 5, 1999, in the United States”. The Board found this to be inconsistent with the applicant’s claim that he experienced events in Honduras in 2003 which made him flee that country for his safety. When the applicant was asked to explain this inconsistency, he only submitted that he did not say he was in the United States prior to 2003. The Board concluded that the applicant’s testimony was less than wholly credible or trustworthy.

[17] The Board noted that although the applicant perhaps lied in the United States in order to benefit from the TPS Program, the events in Honduras may have in fact happened in 2003, especially since the applicant provided corroborating statements. The Board thus considered the substance of the claim based on those allegations and concluded that the applicant was not in need of refugee protection.

[18] The applicant waited five years in the United States without making a claim for asylum and without coming to Canada to make a claim for refugee protection. The Board found this was a significant delay in seeking help for serious potential harms such as persecution, death and cruel and unusual treatment or punishment which required an explanation.

[19] The applicant said he was unaware he could make a refugee claim in the United States but the Board did not accept this explanation. The applicant was able to discover he could make an application under the TPS Program, which is part of the immigration system in the United States.

The Board did not find credible that the applicant did not also learn about the possibility of claiming asylum or seeking some form of refugee protection.

[20] The applicant explained he was afraid to make a claim for asylum because he risked deportation if he came to the attention of the American authorities. The Board rejected this explanation, noting that the applicant made repeated applications under the TPS Program until he was asked to stop submitting applications. According to the Board, the applicant was clearly bringing himself to the attention of the American authorities on a repeated basis. The applicant solicited the help of the United States in remaining in that country and the Board concluded he was not too afraid of the refugee determination authorities to approach them.

[21] The Board also found there was insufficient evidence that the applicant was treated differently from others who are the target of recruitment gangs in Honduras. The Board concluded that the applicant did not face a personalized risk, but rather, a risk which is faced generally by others in Honduras.

[22] The Board further noted that there were approximately 36,000 gang members in Honduras in 2007 and 2008, whereas others put the estimate as high as 70,000. Gangs in Central America, including Honduras, are heavily involved in the drug trafficking industry and they are also involved in kidnapping, human trafficking, as well as auto and weapons smuggling. Gang-related violence reportedly accounts for up to 50% of violence in Honduras. The Board recognized this problem but

did not have much information about the internal structures of gangs, including the gang Mara Salvatrucha 13.

[23] The Board concluded that the applicant was treated in a manner which is faced generally by other individuals in or from Honduras and there is nothing in the applicant's story which would lead the Board to find that he was subject to a different recruitment experience from that faced generally by other individuals.

Issues

[24] This application raises the following issues:

1. Did the Board err in finding that the applicant is less than wholly credible or trustworthy?

2. Did the Board base its decision that the applicant has not proven that he has a subjective fear of persecution on an erroneous finding of fact without regard to the material before it?

3. Did the Board err in finding that the applicant does not face a risk to his life under section 97 of the Act and that this risk is faced generally by other individuals in and from Honduras?

Analysis

Standard of Review

[25] The applicant and the respondent both argue, and the Court agrees, that the standard of review to be applied in the case at bar is reasonableness.

[26] Assessing credibility and weighing the evidence fall within the jurisdiction of the administrative tribunal called upon to assess a refugee claimant's allegation of subjective fear (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, (1998), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264 at par. 14). The Court will only intervene if the Board based its decision on an erroneous finding of fact made in a perverse of capricious manner or if it made its decision without regard to the material before it (*Aguebor v. Canada (Minister of Employment and Immigration)*, (1993), 160 N.R. 315, 42 A.C.W.S. (3d) 886 (F.C.A.)). Since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the applicable standard of review is reasonableness.

1. Did the Board err in finding that the Applicant is less than wholly credible or trustworthy?

[27] The applicant argues that he provided a detailed answer and explanation to the questions of the Board and he explained the TPS Program. The Board referred to an inconsistency which is based on a misinterpretation of the decision of the Administrative Appeals Office regarding TPS Program applications. The applicant submits that the dates referred to in the Administrative Appeals Office letter are based on the requirement of the TPS Program to be consistently in the United States to qualify and does not imply that the applicant was physically in the United States during that time.

[28] The Court notes that the Board is in the best position to assess the explanations provided by the applicant with respect to the perceived inconsistencies and it is not up to the Court to substitute its judgment for the findings of fact drawn by the Board concerning the applicant's credibility (*Singh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 181, 146 A.C.W.S. (3d) 325

at par. 36; *Mavi v. Canada (Minister of Citizenship and Immigration)*, (2001), 104 A.C.W.S. (3d) 925, [2001] F.C.J. No. 1 (QL)).

[29] In this case, the Board's finding was not unreasonable given the inconsistencies in the applicant's testimony and evidence. The applicant did not provide convincing evidence of his subjective fear as he waited five years to claim refugee protection in Canada. His explanation, that he was unaware he could claim asylum in the United States, is implausible, particularly considering his multiple application attempts under the TPS Program and that the TPS Program is part of the immigration system in the United States. The applicant also failed to adequately explain the inconsistency concerning his residence and physical presence in the United States stemming from the decision of the Administrative Appeals Office.

2. Did the Board base its decision that the applicant has not proven that he has a subjective fear of persecution on an erroneous finding of fact without regard to the material before it?

[30] The applicant submits his numerous attempts to be recognized as a beneficiary under the TPS program in the United States, clearly demonstrate his subjective fear of persecution. The applicant argues he provided a reasonable explanation that he did not file a claim for asylum because he was scared he would be returned to his home country by the American authorities. The applicant submits it is a well known fact that the American asylum program is very difficult and the applicant decided to attempt to obtain beneficiary status under the TPS program.

[31] The applicant further alleges that the very fact he left the United States for Canada when he realized he did not qualify under the TPS program and may be returned to Honduras is proof of his consistency and demonstrates that he was still scared to be returned to Honduras. When the applicant arrived in Canada, he immediately filed a refugee claim as he knew that Canada does not have an equivalent to the TPS program.

[32] According to the respondent, the Board reasonably found the applicant's actions were inconsistent with a subjective fear of persecution. The Board found that the applicant's failure to claim asylum in the United States adversely affected his claim of a subjective fear and also his credibility regarding the events in Honduras and it was reasonably open to the Board to find that these actions were not consistent with a subjective fear of persecution. As noted in *Riadinskaia v. Canada (Minister of Citizenship and Immigration),* (2001), 102 A.C.W.S. (3d) 967, [2001] F.C.J. No. 30 (QL), it was open to the Board to find that if the applicant had really feared for his life, protecting his life would have been his greatest concern.

[33] The applicant must satisfy two components in order to establish a well-founded fear of persecution: a subjective fear and an objective basis for the fear. This Court confirmed that failure to show a subjective fear of persecution is fatal to a claim (*Rodriguez v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 292, 119 A.C.W.S. (3d) 999 at par. 32; *Herrera v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 979, 161 A.C.W.S. (3d) 469 at par. 23-24). The Court finds that the Board's conclusion of a lack of subjective fear was reasonable, particularly given that the applicant waited five (5) years before coming to Canada to claim refugee status.

Indeed, in *Mejia v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1087, 151 A.C.W.S. (3d) 509, the Court found that the Board committed no error in finding that a stay of fifteen (15) months in the United States was inconsistent with a subjective fear. In the case at bar, the Court is therefore of the view that a stay of five (5) years in the United States, without seeking asylum, is inconsistent with a subjective fear.

3. Did the Board err in finding that the Applicant does not face a risk to his life under section 97 of the Act and that this risk is faced generally by other individuals in and from Honduras?

[34] The applicant submits that this Court, in *Surajnarain v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1165, 336 F.T.R. 161, correctly found that for a claim to be accepted, a claimant should face a risk which is not indiscriminate or random and can be faced by a small group of the population. If the risk is faced by the whole population, the claim would not succeed.

[35] The respondent submits that on the particular facts of this case, where a large subgroup of the population of a country is concerned, the large subgroup may be considered a general population, as was found in *Osorio* at par. 22 to 27. As noted in *Osorio*, it would be unreasonable that every young man in Honduras would qualify for protection if they were only able to come to Canada.

[36] The fact that the recruitment is personal does not necessarily mean that the risk is personalized. It does not mean that the activity is not one which is not faced generally by other

individuals since, as mentioned by the Board, “the very nature of recruitment is putting individual people into organisation”.

[37] The documentary evidence demonstrates that gangs are a serious problem in Honduras and that most people are at some risk from them. As for recruitment faced by the applicant, the Court is of the view that, based on the evidence, a large subset of the population, basically all young men, are at risk of recruitment strategies similar to that alleged by the applicant and this was considered by the Board.

[38] In *Gabriel*, this Court recently analyzed whether a large sub-group of a population constitutes a personal risk or a risk faced by a general population. In *Gabriel*, the Court found at par. 23 that the risk must be particularized to the personal circumstances of the claimant. As such, in this case, the applicant must demonstrate a personalized risk not applicable to every other young man in Honduras and the respondent argues that the Board was not unreasonable in finding that he had not done so.

[39] Based on the jurisprudence of this Court, I am of the view that the applicant does not face a personalized risk that is not faced generally by other individuals in or from Honduras. The case law states that a generalized risk need not be experienced by every citizen and a subgroup of the population can face a generalized risk. As noted in *Gabriel* at par. 20: “a generalized risk could be one experienced by a subset of a nation’s population thus, membership in that category is not sufficient to personalize the risk”. In this case, the applicant could not personalize his risk beyond

membership to the subgroup of young men who are recruited to become members of gangs in Honduras. The applicant's own corroborating evidence from the pastor explains that many young men are targeted by these gangs.

[40] Hence, in light of the above, the Court finds that the Board conducted a thorough and proper analysis and did not make a reviewable error in assessing the evidence or applying the law. The outcome falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and in law *(Dunsmuir*; *Canada (M.C.I.) v. Khosa*, 2009 SCC 19).

[41] The Court's intervention is thus not warranted and for these reasons, the application for judicial review is dismissed. There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question is certified.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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