Federal Court Cour fédérale

Date: 20110525

Docket: IMM-5324-10

Citation: 2011 FC 611

Ottawa, Ontario, May 25, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

JHON EDUARD ORTEGA AYALA
ANGELICA ORTEGA AYALA
KEVIN ALBERTO AVELLAN

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated August 3, 2010, wherein the Applicants were determined to be neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA]. The

determinative issues for the Board were the Applicants' credibility, claim of subjective fear and whether their fear was objectively well-founded.

[2] For the reasons that follow, this application is dismissed.

I. Background

A. *Factual Background*

[3] Jhon Eduard Ortega Ayala (the Principal Applicant, PA) and his sister, Angelica Ortega Ayala (collectively, the Applicants) are citizens of Colombia. The minor Applicant, Kevin Alberto Avellan, the son of Angelica, is a citizen of the United States of America (USA). Their claim for refugee protection was premised on threats they allegedly received from the Revolutionary Armed Forces of Colombia (FARC).

[4] The Applicants allege that their problems began in December 1994 while they were vacationing at their grandfather's farm in Sonora, Valle Cauca, in Trujillo Colombia. While the family was out horse-riding, they were approached by armed men who later identified themselves as members of the FARC. Their father and the steward of the farm were separated from the group and informed that they needed to keep paying the *vacuna*, the tax imposed by the guerrillas in order to be able to live and work in the region. They were warned not to go to the authorities. Alarmed, the family decided to return to Bogota once they returned to the farm.

[5] In mid-June 1995, the Applicants' family returned to the farm to attend the first communion of the farm steward's children, which was being held at the community hall in the town. Later that night as the Applicants were getting into their car, they claim they heard gunshots and people yelling. The Applicants' father told them to lie on the floor of the car, and he drove as fast as he could back to the farm. They retrieved their belongings and left for Bogota. Later, in Bogota, they learned that the FARC had entered the community hall that night and killed 13 people. Their father later accompanied his parents to make a denunciation to the police in the city of Cali.

[6] At the beginning of September 1995, their father received a threatening phone call from a man who identified himself as a member of the FARC. He told their father that their family would be safe as long as they continued to pay the *vacuna*. He used the names of the Applicants. At this point the Applicants' parents became fearful for their safety, and sent them to the USA.

B. *Impugned Decision*

[7] The Board first rejected the claim of the minor Applicant since he is a citizen of the USA and no claim had been made against the USA. In considering the claim of the two adult Applicants, the Board assessed the Applicants' oral and written evidence and all of the documentary evidence, but concluded that the Applicants lacked credibility, and were unable to establish that they had either a subjectively or objectively well-founded fear of persecution.

[8] The PA failed to provide any documentary evidence to show that his grandfather owned the farm where the Applicants' problems with the FARC allegedly began. The Board found the PA's

explanation for why he had not obtained such documentation, including *inter alia*, that it would take a long time to get such documents, to be unreasonable. The Board expected to see such documents because other Colombian claimants had been able to produce them at other hearings and because the farm was central and material to their claim. The failure to provide corroborating documentary evidence of farm ownership raised a serious doubt in the Board's mind as to whether the grandfather owned the farm, and therefore the Board disbelieved that the incidents of December 1994 and June 1995 had happened. The Board therefore disbelieved that the Applicants' family received threats from the FARC and found that the Applicants had fabricated their story.

[9] The Board further noted that even if it believed the Applicants' story, there was no evidence that the Applicants were ever personally targeted. Rather their father and the farm steward were threatened. Moreover, *vacuna* was allegedly regularly paid to the FARC and so there was no reason for the FARC to threaten the Applicants' family.

[10] The Board found that the PA's long stay in the USA without attempting to claim asylum was inconsistent with a subjective fear of persecution. The PA explained that he could not afford to hire a lawyer and that he could not file an asylum claim after being in the USA for over a year. The Board rejected these explanations. The Board further found that the PA's testimony regarding his mother's return to Colombia was inconsistent with a subjective fear of persecution. Although she left Colombia with the Applicants in 1996, she was deported to Colombia in 1997. She did not attempt to seek refugee protection in Mexico or Canada before returning to Colombia. The PA also failed to provide documentary evidence to support his allegation that his mother needed to return to Colombia to take care of her ailing mother.

[11] The Board did not believe that the Applicants had an objectively well-founded fear of persecution in Colombia today, since there was no evidence that the FARC had attempted to harm their mother, or determine the whereabouts of the Applicants. The Board also found that there was no reason for the FARC to target the Applicants based on the denunciations made by their father.

[12] The Board concluded that there was less than a mere possibility that the Applicants would be persecuted by the FARC should they return to Colombia.

II. Issues

[13] This application raises the following issues:

(a) Was it reasonable for the Board to make an adverse credibility inference based on the PA's failure to provide corroborating documentary evidence?

(b) Was it reasonable for the Board to reject the PA's testimony that he was unable to apply for asylum in the USA after one year?

(c) Was it reasonable for the Board to rely on evidence regarding the PA's mother in order to draw an adverse inference?

(d) Did the Board make unreasonable implausibility findings?

III. Standard of Review

[14] It is well-established that decisions of the Board as to credibility are factual in nature and are therefore owed a significant amount of deference. The appropriate standard of review is a standard of reasonableness (*Lawal v Canada (Minister of Citizenship and Immigration)*, 2010 FC 558 at para 11; *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, 42 ACWS (3d) 886 (FCA) at para 4). Similarly, the weight assigned to evidence and the interpretation and assessment of evidence are all reviewable on a standard of reasonableness (*NOO v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045 at para 38).

[15] As set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, reasonableness requires consideration of the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within a range of acceptable outcomes that are defensible in respect of the facts and law.

IV. Argument and Analysis

A. *Did the Board Make Reasonable Credibility Inferences?*

[16] The Applicants submit that the Board was unreasonable in basing its negative credibility finding on the Applicants' failure to produce documentary evidence to show the existence of their grandfather's farm. The Applicants argue that the expectation that they would corroborate statements made under oath was unreasonable. The Applicants submit that it is trite law that

without valid reason to doubt an applicant's credibility it is an error for the Board to require documentary evidence to corroborate an allegation (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA) at para 5).

[17] The Respondent takes the position that it is not improper to expect the Applicants to provide documentary evidence that should be reasonably available to them, and that the onus remains on the Applicants to adduce sufficient evidence to support their claim. The Respondent submits that this Court has held that where a claimant's story has been found to be implausible or lacking in credibility, a lack of documentary corroboration can be a valid consideration for the purposes of assessing credibility (*Bin v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1246, 213 FTR 47 at para 21).

[18] At the hearing, the PA explained that "the process to find the documents in Colombia is very long and a long time had passed…" (Certified Tribunal Record (CTR) pg 537) so he would not be able to get the documents. When asked, he clarified that he had not attempted to obtain the documents.

[19] The Respondent is accurate in relying on the jurisprudence of this court to state that the onus is on the refugee claimant to adduce sufficient credible and trustworthy evidence to establish that there is a reasonable chance that the claimant would be persecuted if returned to his country of origin. Certainly in this case, it was open to the Board to come to the conclusion that the Applicants had failed to satisfy this requirement. However, I do find the Board's logic puzzling with respect to the lack of documentation corroborating either the existence of the farm, or the grandfather's

ownership of the farm, which I agree was central to the narrative in terms of setting the scene of and motive for the alleged persecution. The Board reasoned, starting at para 12 of the reasons:

> [12] The claimant's failure to provide the farm ownership documents raises a serious disbelief in the panel's mind as to whether his grandfather owned the alleged farm in Sonora. There is no persuasive documentary evidence from reliable sources that suggests that the claimants' grandfather owned a farm in Sonora where his problems with the FARC took place. The documentary evidence does not indicated that their family's problems with the FARC took place at their grandfather's farm. The onus is on the claimants to establish their claim.
>
> [13] Therefore, based on the evidence adduced, the panel disbelieves that the claimant's grandfather owned a farm in Sonora as alleged and, therefore, it disbelieves that the alleged incidents of December 1994 and mid-June 1995 ever took place. Since the panel disbelieves that the claimant's grandfather owned a farm, it disbelieves that the FARC demanded *vacuna* from the claimants' family and as a result, it disbelieves that the claimants' family received threats from the FARC for failing to pay *vacuna*.
>
> [14] The panel finds that the claimants have fabricated their story about their fear of persecution at the hands of the FARC guerrillas in Colombia.

[20] This reasoning is out of line with the body of case law of this Court and is unreasonable in that it plants as the seed of incredibility the lack of corroborating documentary evidence instead of using the lack of documentary evidence to buttress an existing adverse credibility finding. The Board points to no other reason to disbelieve the Applicants' testimony. As the Respondent argues, a lack of documentary evidence can be a valid consideration where a claimant's story has been found to otherwise lack credibility. For example, in *Bin*, above, cited by the Respondent, Justice Denis Pelletier went on to say at para 22:

> [22] In the present case, the applicant's claim had been discredited by a number of internal contradictions and inconsistencies. It was therefore open to the CRDD to consider his failure to produce corroborating evidence in further assessing his credibility […]

[21] The Board was entitled to find the Applicants' explanation for failing to produce the documents unreasonable. But the Board was not entitled to discredit the Applicants' entire claim solely on the basis of this failure. To do so would be to ignore the oft-cited ratio of *Maldonado*, above.

[22] Further, the Board appears to have either ignored or misapprehended relevant evidence in coming to the conclusion that the incident of mid-June 1995 did not occur. The Applicants submitted a police report filed by their father. The report names the Applicants and their parents and refers to an investigation of the massacre of 13 individuals on June 23, 1995 in the township of Sonora. Clearly it was an error to not even mention this evidence in coming to the conclusion that the incidents referred to by the Applicants never occurred (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, 83 ACWS (3d) 264).

[23] This constitutes a reviewable error. As Justice Michel Shore held in *Torres v Canada (Minister of Citizenship and Immigration)*, 2011 FC 67 at para 26:

> Canadian jurisprudence indicates that an adverse finding of credibility must have a proper foundation in the evidence. Credibility findings must be explained and must be supported by the evidence. While the Board dismissed the plausibility of Mr. Ortiz Torres' narrative, it made no specific reference to specific evidence to the contrary. Failure to lay out a clear and specific evidentiary basis is unreasonable and the result is that it renders each of the findings speculatory (*Kanaphathipillai v Canada (Minister of Citizenship and Immigration)* (1998), 81 ACWS (3d) 859, [1998] FCJ 1110 (QL/Lexis); *Ali v Canada (Minister of Citizenship and Immigration)*, 2003 FC 982, 125 ACWS (3d) 477; *Armson v Canada (Minister of Employment and Immigration)* (1989), 9 Imm LR (2d) 150, 17 ACWS (3d) 322 (FCA)).

[Emphasis in original]

[24] However, in my view this error is not fatal to the Board's overall decision. The Applicants were required to show that they had both a subjective fear and a well-founded objective fear. The Board went on to say at para 15:

> [15] Even if the panel were to believe the claimant's story, (which it does not), there is no persuasive evidence to suggest that the claimant and/or his sister were ever personally targeted or threatened by the FARC while they lived in Colombia.

[25] The Board went on to find that the Applicants were never directly targeted by the FARC, the Applicants' conduct in the USA was inconsistent with a subjective fear of persecution, and there was no evidence to support a well-founded objective fear of persecution. In short, although I find the Board's credibility determination to be unreasonable, this was not the sole basis of the Board's rejection of the Applicants' claim. The ultimate conclusion that the Applicants are not Convention refugees has not been shown to be unreasonable.

B. *Did the Board Err in Finding that the Applicants Could Have Applied for Asylum After Being in the USA for More Than One Year?*

[26] The Board found that the Applicants sojourn in the USA for over 12 years, where they stayed without making a claim for asylum, was demonstrative of a lack of subjective fear. The Applicants submit that the Board was unreasonable in rejecting their explanation for their failure to claim asylum. The Applicants testified at the hearing that they initially did not have the funds to apply for asylum, and that they were barred from doing so after having spent one year in the USA without claiming. The Applicants argue that the Board did not have the required expertise to find

that there is no law in the USA that indicates that asylum claims cannot be filed after one year's stay in the USA. The Applicants posit that the Board's role was not to comment on what the law in the USA might be, but to assess the reasonableness of the Applicants' actions in light of the legal advice they received from a lawyer practicing immigration law in the USA.

[27] I accept the Respondent's submissions on this point. Contrary to the Applicants' assertion that the Board lacks expertise regarding American asylum law, the Refugee Protection Division's own Responses to Information Requests for the USA indicates that asylum seekers may still submit asylum applications under different categories or conditions even after failing to submit an asylum claim within one year of arrival in the USA. This information is known to the Board and is available to the public. It was not unreasonable for the Board to reject the Applicants' explanations for why they failed to seek asylum status in the USA before coming to Canada, over 12 years after fleeing Colombia.

C. *Was the Board Unreasonable in Relying on Evidence of the Applicants' Mother's Conduct?*

[28] The Applicant submits that the Board unreasonably focused on the Applicants' mother's return to Colombia to find that the Applicants lacked both a subjective and objective fear of persecution as she is not a party to the claim. The Applicants argue that the Board erred in using the actions of their mother to impugn the Applicants' credibility.

[29] The Respondent submits that since the Applicants put forward the fact that their mother is hiding in Colombia in and effort to bolster their claims, it was reasonably open to the Board to

consider their mother's two-time reavailment to Colombia while she was living in the USA, her failure to seek refuge in a safe third country after being deported from the USA, the lack of medical evidence to corroborate the Applicants' claim that she returned to Colombia to treat her ailing mother, and the lack of any persuasive evidence to indicate that she had been targeted by the FARC since being deported to Colombia in 1997.

[30] In my view, the Board did not use the mother's actions to impugn the Applicants' credibility, rather they viewed the mother's actions as indicative of a lack of objective fear of persecution in Colombia. As the Respondent submits, the Applicants cannot argue on one hand that the FARC is extremely sophisticated and able to find anyone of interest, and on the other hand, argue that their testimony regarding their mother's experience in Colombia should be shielded from scrutiny and that it is irrelevant that she has not been contacted by the FARC in the 13 years she has been back in Colombia. The Applicants have failed to persuade me that the Board has made a reviewable error.

D. *Did the Board Make Unreasonable Implausibility Findings?*

[31] In addition to the above arguments, the Applicants also submitted further illustrations of error on the part of the Board. For example, the Board was not convinced that the FARC would be interested in targeting the Applicants due to police reports made by their father because their father never explicitly mentioned the FARC in these denunciations. The Applicants disagree with this assessment. With respect, the remainder of the Applicants' arguments amount to simply that - disagreement with how the Board chose to weigh the evidence. Admittedly I have expressed

reservations about the Board's reasoning with respect to the credibility of the Applicants' subjective fear, nonetheless, a reading of the overall decision reveals that the Board was simply not satisfied that the Applicants' discharged the onus of persuading the Board that there was more than a mere possibility that they would be persecuted should they be returned to Colombia. Arguably the Board could have come to this conclusion irrespective of the credibility of the Applicants. The Applicants were unable to provide evidence that they had ever been, or ever would likely be, directly, personally targeted by the FARC. Although I might have chosen to write the decision differently, or placed greater or lesser emphasis on certain pieces of evidence, it remains that the Board's conclusion falls within the range of possible outcomes defensible in respect of the facts and law. As such there is no reason for this Court to intervene.

V. Conclusion

[32] No question to be certified was proposed and none arises.

[33] In consideration of the above conclusions, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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