Federal Court Cour fédérale

Date: 20110627

Docket: IMM-6234-10

Citation: 2011 FC 774

Ottawa, Ontario, June 27, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

BABURAM SINGH

Applicant

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 October 1, 2010, wherein the Applicant was determined to be neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Board found that the Applicant failed to rebut the presumption of state protection.

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

I. Background

A. *Factual Background*

[3] The Applicant, Baburam Singh, is a citizen of Guyana. He worked as a repair technician with the Guyanese Coast Guard.

[4] On September 19, 2008 the Applicant was working on a Coast Guard vessel when it intercepted another vessel. The Coast Guard personnel boarded the vessel and conducted a search. A large amount of cocaine was found on board. In the course of the search, the men on board the boat threatened the Applicant and the other Coast Guard personnel, saying they would be "finished". The six men on board the boat were arrested and taken, along with their boat, to the Coast Guard base. The police then took the men into custody.

[5] Approximately two weeks later, the Applicant recognized some of the individuals from the intercepted boat hanging around in a parked vehicle outside the coastguard base. The Applicant claims they mimicked shooting a gun at him.

[6] Soon after, the Applicant claims to have received threatening phone calls at his home. The caller wanted to know where the seized drugs were being stored. The Applicant was threatened with death if he refused to cooperate. He claims to have received ten similar phone calls between

October and November 2008, each time telling the caller that as a repair technician he had no knowledge of the seized drugs.

[7] The Applicant allegedly made complaints to both the Commanding Officer of the Coast Guard, and the police in Georgetown when he realized that his life was in danger – the night he received the second phone call. Although the police took a report and said they would look into the matter, to the best of the Applicant's knowledge, no action was ever taken on his behalf.

[8] The Applicant came to Canada in November 2008 to attend the funeral of his younger brother. He entered on a visitor visa. After sharing his fears with his relatives, he was advised to seek refugee protection. He did on December 12, 2008.

B. *Impugned Decision*

[9] The Board found that the Applicant failed to take all reasonable steps under the circumstances to seek state protection in Guyana. He only approached the authorities on one occasion prior to seeking international protection in Canada. The Applicant did not know if his complaint was investigated, or the results of any investigation that was conducted because he did not follow up. The Applicant did not know if his alleged persecutors were prosecuted or incarcerated, because he did not inquire.

[10] The Board found that the Coast Guard and police in Guyana were working effectively on September 19, 2008 when they intercepted the vessel, found a substantial quantity of illicit drugs,

and apprehended and arrested the suspects on board the vessel. The Board was of the view that these actions suggested that state protection would be available for the claimant, as no persuasive evidence was adduced to indicate that state protection would not be forthcoming.

[11] The Board concluded that the Applicant's own actions, namely his failure to follow-up, may have thwarted the attempts of the police to properly investigate the Applicant's allegations.

II. Issues

[12] The Applicant raises the following issues:

(a) Did the Board err by conducting a state protection analysis without first assessing the Applicant's credibility?

(b) Was the Board's state protection finding unreasonable?

III. Standard of Review

[13] The Board's conclusion regarding the application of the test for state protection and the weight attributed to evidence in coming to that conclusion are issues of mixed fact and law and are reviewable on a standard of reasonableness (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339; *Barajas v Canada (Minister of Citizenship and Immigration)*, 2010 FC 21 (QL) at para 21 and *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 696, 170 ACWS (3d) 168 at para 11).

[14] As set out in *Dunsmuir*, above, reasonableness requires a consideration of the existence of justification, transparency, and intelligibility within 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 Err by Conducting a State Protection Analysis without First Assessing the Applicant's Credibility?*

[15] The Board's decision contains no express credibility finding. The Applicant submits that absent a determination of the plausibility and credibility of the Applicant's narrative, the Board is unable to properly engage with the factual context that informs the state protection analysis. The Applicant relies on recent decisions of this Court dealing with this identical situation: *Flores v Canada (Minister of Citizenship and Immigration)*, 2010 FC 503; *Jimenez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 727; *Moreno v Canada (Minister of Citizenship and Immigration)*, 2010 FC 993, 92 Imm LR (3d) 119; *Pikulin v Canada (Minister of Citizenship and Immigration)*, 2010 FC 979, 92 Imm LR (3d) 133.

[16] The Respondent submits that although it might be preferable for the Board to first assess the credibility of the claim, the absence of such a finding does not automatically result in a reviewable error. The Respondent respectfully submits that the Court's interpretation of the test for persecution in *Jimenez*, above, is not in accordance with the appellate jurisdiction, and urges the Court to adopt

the interpretation outlined by the Supreme Court in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1, and the Federal Court of Appeal in *Rajudeen v Canada (Minister of Employment and Immigration)*, 55 NR 129, [1984] FCJ No 601 (QL).

[17] I agree with the Applicant and the Respondent that it certainly would have been preferable for the Board to have assessed the Applicant's subjective fear before analyzing the objective component. However, this failure alone does not raise a reviewable error. Despite the Respondent's submission, I largely accept the Court's reasoning and subsequent decision in *Flores*, above, but find that it is distinguishable from the present matter on the facts. As I read the decision, the Board's error in *Flores, above,* was to have conducted a state protection analysis in factual vacuum without regard to the applicant's personal circumstances or the particular factual context of the claim. The same cannot be said for the instant case.

[18] As the Applicant submits, there is no credibility finding readily apparent in the Board's decision. Implicit, however, in the state protection analysis is an acceptance of the truth of the Applicant's account. The problematic element in the series of cases cited by the Applicant, is a "veiled credibility finding" that coloured the board's analysis of the willingness and ability of the state to protect. Despite making no explicit pronouncement either accepting or rejecting the claimants' accounts of their dealings with state authorities, the board, in those cases, preferred the documentary evidence over the testimony of the applicants to conclude that adequate and willing state protection existed.

[19] For instance, in *Flores*, above, the Board came to the conclusion that Mexico was willing and able to protect the applicant, despite the applicant's own testimony that protection had not been forthcoming on any of the occasions that he had approached authorities. The claimant in *Flores*, above, testified that: he approached the police in Guadalajara but they refused to take his statement; he was accosted by members of the judicial police who ordered him to keep quiet about his father and his illegal activities; his mother tried to retain a lawyer to take his case, but they all refused for fear of retaliation and recommended that he flee Mexico; and finally, that in his case, the police themselves acted as the agent of persecution. Despite all of this, the board found that the applicant had not rebutted the presumption of state protection because the documentary evidence showed that he could have made an application to a human rights commission in Mexico or used a telephone line made available for reporting corruption in the public service. In short, the applicant adduced evidence of the state's unwillingness to protect, and the board conducted its state protection analysis without considering the importance of that evidence, if it were taken to be true.

[20] Justice Robert Mainville nicely summed up the incoherence of the board's approach at para 47, before finding that the decision was unreasonable:

> [47] In this case, the absence of an analysis of the applicant's subjective fear by the panel leads to the conclusion that a person severely beaten by the police and pursued by a major drug trafficker (also involved in human trafficking) who is acting in collusion with the police in several cities in Mexico would still enjoy state protection by reporting the corruption via a telephone line set up for that purpose or by filing a complaint with a human rights commission.

[21] As Justice Mainville made clear in *Flores*, above, each case is *sui generis*, and an analysis of the individual case must be carried out before the board can conclude that the presumption of state protection has not been rebutted (para 38).

[22] In the present matter, the Board found that the Applicant failed to rebut the presumption of state protection, because, as per the test in *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, 69 Imm LR (3d) 309, he failed to adduce any probative evidence that could convince the Board, on a balance of probabilities, that state protection was neither adequate nor forthcoming. I am satisfied that the Board did in fact conduct the state protection analysis while accepting that the Applicant's allegations were true. There was no disguised credibility finding, and the Board engaged with the factual matrix presented by the Applicant's testimony.

[23] Although part of the Board's reasons feel boiler-plate in their thorough review of state protection jurisprudence and a run-through of the country condition evidence, the Board spent considerable time reviewing the testimony the Applicant gave regarding his efforts to seek state protection. The Applicant reported the threatening phone calls to the police once. At para 16 of the decision the Board wrote:

> When asked if the police investigated his allegations, the claimant said not as far as he knew. When asked how he knew that, the claimant said because he still received threatening phone calls after he filed the report. When asked if he ever followed up with the police regarding his allegations, the claimant said that he did not. When asked why he did not follow up, the claimant stated that since he had made his report, he thought that the police would do their job.

[24] The Board then concluded at para 17:

> I find that the claimant did not take all the reasonable steps under the circumstances to seek state protection in Guyana before seeking international protection in Canada. The claimant approached the authorities in Guyana on one occasion. He does not know if the police investigated his allegations, or the results of an investigation, if one was conducted, because he did not follow up with the police. The claimant does not know if the six suspects arrested on September 19, 2008 were ever prosecuted for the crimes they allegedly committed that day. The claimant did not inquire about the state of those apprehended from the police or the coastguard. He did not check media reports regarding the incident. The claimant does not know if those he believes were pursuing him are incarcerated or not.

[25] The Board reviewed the documentary evidence and found that the preponderance of the objective evidence regarding current country conditions suggested that although not perfect, adequate state protection was available in Guyana. The Applicant failed to rebut this presumption, not because he presented a dubious tale, but, because, by his own admission, the thought that the police would do their job, and he left for Canada before that belief could be borne out.

[26] Given the specific facts of this case, the failure of the Board to explicitly address the Applicant’s credibility does not amount to a reviewable error.

B. *Was the Board’s State Protection Finding Unreasonable?*

[27] The Applicant submits that if the absence of a credibility finding is not alone a fatal flaw, the Board’s conclusion regarding state protection is nonetheless unreasonable. This is based on the Applicant’s contention that the Board discussed country condition documents with marginal

relevance to the drug trade but ignored documentary evidence dealing specifically with the issue of the drug trade and the authorities' inability to respond.

[28] The Respondent takes the position that the Board thoroughly canvassed the nature of the Applicant's claim of risk and reviewed the documentary evidence on country conditions in its detailed reasons before concluding that the Applicant failed to rebut the presumption of state protection. Thus, no reviewable error exists.

[29] The Applicant specifically identified his agents of persecution as Afro-Guyanese drug traffickers. The question I must answer is whether the Board, in conducting the state protection analysis, failed to appreciate documentary evidence suggesting that the authorities are unable to offer protection to the victims of drug traffickers. The Applicant relies on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, 83 ACWS (3d) 264. In that case, the Court held that the Board must explain why it gives no weight to documentary evidence that supports the claimant's account but contradicts the Board's own conclusion. Here, however, the issue is not that the Applicant adduced evidence that the state was unwilling to protect victims of drug-traffickers which was then silently dismissed by the Board. Rather, the Applicant failed to provide any convincing evidence demonstrating that protection was neither forthcoming, nor adequate.

[30] The Applicant specifically cites three documents contained in the Board's own national documentation package. The United States February 2009 Department of State International Narcotics Strategy Report noted:

> Government counternarcotics efforts remain hampered by inadequate resources for, and poor coordination among law enforcement agencies, an overburdened and inefficient judiciary; and the lack of a coherent and prioritized national security strategy. Murders, kidnappings and other violent crimes commonly believed to be linked with narcotics trafficking are regularly reported in the Guyanese media…UGS analysts believe drug trafficking organizations in Guyana continue to elude law enforcement agencies through bribes and coercion.

[31] The United States March 2010 Department of State Guyana Country Report similarly found that resource constraints limited the effectiveness of the Guyanese Police Force and that public confidence in the police remained low due to corruption. Lastly, the Applicant points to a document entitled, "Criminal Violence and State Response, touching on aspects of the police force, drug trafficking and related criminal activities". This article describes a "phantom death squad" that is alleged to have killed hundreds of people in Guyana and has been linked to the drug trafficker Shaheed Roger Khan.

[32] None the of these documents detail anything other than what is already contained in the Board's quite extensive review of the documentary evidence. Corruption, inefficiency and bribery remain real concerns in Guyana. The Board acknowledged as much at para 21 of the decision. The Board explicitly discussed two articles submitted by the Applicant's counsel. Although those articles did not deal squarely with drug trafficking, the concerns they brought to the front of the Board's mind are the same as those emphasized by the documents submitted by counsel on this application for judicial review. Evidence of corruption and inefficiency seem to be the same when

dealing with drug trafficking specifically and criminality generally. The documentary evidence equally illustrates measures implemented by the state to address these issues. This Court is not to put itself in the Board's shoes and perform a reweighing of the evidence to produce a more preferable outcome for the Applicant.

[33] Furthermore, the documents cited by the Applicant lack the specificity required to warrant interfering with the Board's decision. They do not directly counter the Board's conclusion that, "Guyana is in effective control of its territory and has in place a functioning Security force to uphold the laws and constitution of the country," nor do they unequivocally support the Applicant's own account.

[34] The Applicant has failed to disclose a reviewable error. The Board's conclusion is reasonable and should not be disturbed.

V. Conclusion

[35] No question was proposed for certification and none arises.

[36] 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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