Federal Court  Cour fédérale

Date: 20110722

Docket: IMM-7390-10

Citation: 2011 FC 912

Ottawa, Ontario, July 22, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

VICTOR LABRADOR ALFARO
LOBELIA ESTER VALERINO AVILA
VICTOR MANUEL LABRADOR VALERINO
JUAN CARLOS LABRADOR VALERINO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review arises from a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board) dated November 23, 2010, which determined that the applicants were neither Convention refugees nor persons in need of protection. For the reasons that follow, the application is granted.

The Facts

[2] The principal applicant, (the applicant) Victor Labrador Alfaro, his wife Lobelia Ester Valerino Avila and their children Victor Manuel Labrador Valerino and Juan Carlos Labrador Valerino are citizens of Cuba.

[3] The applicant came to Canada in December 2002 as a temporary foreign worker. He worked as an engineer for a joint venture between a company of the Cuban government and a private Canadian company. His family joined him in Canada in 2003. The female applicant, a university professor, took a five-year leave of absence at that time. In 2006, the applicant was promoted to the position of Assistant Project Manager, the second most senior position in the joint-venture company.

[4] In August 2007, a year prior to the expiry of the applicant's exit visa from Cuba, Roman Balan, the applicant's manager, decided to stay in Canada permanently. The evidence before the Board was that Balan and the applicant were close friends. The Cuban government subsequently sent a letter to the applicant describing Balan as a thief and a traitor. When the applicant expressed concerns about the letter to his new supervisor, his supervisor accused him of having ideological problems.

[5] Shortly thereafter, the female applicant was informed that her leave of absence was being terminated early. She was told to return to work in Cuba immediately or else she would be fired.

[6] In March 2008, the applicant testified as a witness at another colleague's refugee hearing. At his own hearing the applicant testified that he suspects that his new supervisor somehow learned of this testimony, but this was rejected as speculative.

[7] On June 16, 2008 after having been in Canada for close to eight years, the applicant spoke with a human resources manager at his company and told him that he wanted to immigrate to Canada. The human resources manager told him to inform his supervisor, which he did. When the applicant told his supervisor that he wanted to immigrate to Canada, his supervisor fired him and called him a traitor. The applicant was given a week to vacate the company house in which he and his family lived and was told to return his company car immediately. The applicants' home in Cuba, which they had been renting out while they were abroad, was also seized by the government. The applicant was required to engage counsel and commence legal proceedings to recover severance pay.

[8] On August 11, 2008, the date of the expiry of his exit visa, the applicant made his claim for refugee protection, alleging a fear of persecution based on imputed political opinion and membership in a particular social group.

The Decision Under Review

[9] The Board found that the principal applicant and the female applicant were credible witnesses, but rejected their claim based on a lack of objective risk of persecution or that they would be considered dissidents because of their attempt to immigrate to Canada. The Board found that the applicants had not been persecuted or labelled as dissidents in the past. The Board considered the

applicant's claim that his employer learned of his involvement in his colleague's refugee hearing, but rejected it on the basis that refugee proceedings in Canada are held in camera. It noted evidence of the Cuban government's dissatisfaction with its citizens who immigrate to Canada, but found that it did not establish a direct threat to the applicants.

[10] The Board also rejected the applicants' claim that their treatment around the time they initiated their refugee claim was persecutory. Specifically, the Board found that there was nothing persecutory about the demand that the applicant return to Cuba to renew his permit, noting that the applicant had been highly trusted by his government. The Board also found that there was nothing persecutory about the termination of the female applicant's and principle applicant's employment, the requirement that the company car be returned and the company house be vacated, or the seizure of their house in Cuba. Rather, the Board found that these events were the consequence of a decision to emigrate from a communist country, where employment and housing are government-run.

[11] The Board found that the applicants had violated Cuba's exit laws, but that the violation of those laws did not establish a need for refugee protection. In making this finding, the Board relied on *Valentin v Canada (Minister of Employment and Immigration)*, [1991] 3 FC 390, and *Castaneda v Canada (Minister of Employment and Immigration)* [1993] FCJ No 1090. The Board also found that those who violate Cuba's exit laws may be considered dissidents, accepted that the applicants would face social isolation when returned to Cuba, but found that this isolation and discrimination fell short of persecution.

[12] The Board noted that the applicants did not claim that they could be killed if they returned to Cuba, and found that they were not persons in need of protection.

The Issues

[13] The applicants contend that the Board applied the incorrect test in assessing their claim and ignored relevant evidence. Whether the Board applied the correct legal test is a question of law and is therefore reviewable on the correctness standard. The weight accorded the evidence and determinations as to whether that evidence meets the burden of proof is entitled to deference and is assessed on a reasonableness standard.

[14] The Court of Appeal has made clear that refugee claims cannot be self-induced simply by reason of the consequences that might subsequently befall the claimant for over-staying an exit visa issued by the claimant's home country on return: *Valentin*. The fact that the applicant is in breach of the exit visa and may in consequence suffer penalties of some form does not end the matter. There remains an obligation, well-established in the jurisprudence, on the Board to examine "… the question whether there was a risk of severe or extrajudicial treatment in the hands of a repressive regime as a result of his alleged exit from the country and a failed refugee claim.": *Donboli v Canada (Minister of Citizenship and Immigration)* 2003 FC 883 at para 6, per Justice Eleanor Dawson, now of the Court of Appeal.

[15] The Board did not, in this case, address this latter component of the test. While there was some analysis of the immediate consequences to the applicant while in Canada, there was no

prospective analysis of the issues to be faced on return to Cuba. The focus was largely retrospective. The reasons state:

> … In the case of the principal claimant he has been out of Cuba for 8 years and his permit has been renewed every year without question. He has also travelled extensively to foreign countries with his work. This evidence suggests that the principal claimant has been highly trusted by his Cuban government employers.
>
> … According to the travel records provided as part the [sic] PIFs of the principal and associate claimant's, it appears that the claimant's family was also permitted to travel to and exit Cuba regularly. If the claimant has been branded as dissidents or even if there were serious suspicions on the part of Cuban authorities, the panel finds, on a balance of probabilities that authorities would not have permitted the family to travel so frequently to and from Canada.

[16] It is axiomatic that the absence of past persecution is not necessary to establish a Convention claim, moreover, the perspective of refugee law is forward looking: *Adjei v Canada (Minister of Citizenship and Immigration)* [1989] 2 FC 680. The Board found that the applicant was a "highly trusted" employee of the Cuban government, who had been labelled a traitor prior to the expiry of his exit visa and there is no doubt that the reaction of the Cuban government was swift and harsh, both in terms of the consequences to the applicant in Canada and in Cuba. It is in this context, taking into account the applicant's history, position and profile that the analysis of extrajudicial consequences is framed and takes on added importance. Again, reverting to Justice Dawson's comment in *Donboli*;

> …However, where a proper evidentiary basis exists it is necessary to consider whether excessive or extra-judicial punishment for an illegal exit could constitute a reasonable basis for a well-founded fear of persecution.

[17] The facts as found by the Board constitute a proper evidentiary basis to warrant such inquiry.

[18] The case of *Perez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 833 is instructive. There, after noting that the applicants could not induce their own need for protection under section 97 of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*) by voluntarily breaching a condition of their exit visa, Justice Judith Snider reviewed the facts as found by the Board:

> Moreover, it is far from clear that the Applicant will be charged and convicted under the applicable law. The documentary evidence demonstrates that the Applicant could still apply for a special re-entry permit to return to Cuba. There is no evidence that the Applicant would, with such a permit, be the subject of prosecution under Cuban laws. The documentary evidence contains not a single reference to a similarly-situated person being imprisoned pursuant to this law. On the facts before me, the allegation of imprisonment is mere speculation. There is simply insufficient evidence for me to find that the Applicant's fear of imprisonment is well-founded.
>
> I conclude that the Board was correct to conclude that the risk of imprisonment in Cuba upon her return did not amount to persecution under s. 96, or risk of cruel and unusual treatment under s. 97.

[19] Justice Snider then concluded, in my respectful view, consistent with the antecedent jurisprudence in *Valentin*, *Castaneda* and *Donboli*, that:

> … it is still possible that the Applicant could have satisfied the Board that she would suffer persecution - beyond a speculative prison term - upon her return to Cuba. The Applicant does not dispute the Board's findings that her treatment prior to leaving Cuba was not persecution. However, she submits that the Board erred by failing to have regard to the evidence that relates to the time after she left Cuba …

[20] The contrast between *Perez* and the case before this Court is marked. The evidentiary foundation referred to by both Justices Dawson and Snider existed in this case. The evidence before

the Board included the following facts:

i. The applicant and Balan were friends.

ii. That subsequent to Balan's defection the applicant received a letter dated September 2, 2007 from the Cuban Ministry of Basic Industry which provided,

> Always it is difficult to face the betrayal from a friend and even more when that person was a member and Team Leader. It has not been easy for you neither has been for the comrades of the Ministry.
>
> There are mixed feelings of wrath and rejection. There are people who feel like wanting to use violence and it is sad for that person has been reduced to a humiliated position as a betrayer deterred neglecting all what he has prepared for and it always deserves our maximum delivery and most of the times it is not enough.
>
> However, today is a day to work, to continue, to be patience and wait and that merely pays back to the traitors, stealers and cowards.

iii. Any reasonable interpretation of that letter would include the inference that Balan would suffer severe punishment, as would any other defector.

iv. The applicant testified that he expressed his disapproval and objection to the letter to his immediate supervisor, he became angry and accused the applicant of having "ideological problems". It should be recalled that the Board found the applicant to be truthful and candid in his testimony.

v. After the applicant advised, in a very transparent and direct way of this desire to immigrate to Canada. Yet he was immediately fired and deemed a *traitor* and accused of having committed *treason*. This language is found in a letter memorandum from the applicants' Cuban superior in Canada and head of the Canadian operations.

[21] *Treason* and *traitor* are strong words with significant consequences. The implications arising from the use of those words, when directed to a trusted member of a government enterprise bear directly on, and reinforce the importance of, the obligation to examine the nature of consequences of the breach of the exit visa outlined in *Donboli*. Similarly, in *Valentin*, the Court examined both the penal and non-penal sanctions. In *Valentin* at paragraph 9 the Court of Appeal did not preclude the possibility that exit laws may, in the context of their particular application, be

persecutory. In considering the relationship between the consequences and violating the criminal law of the home country and a claim for refugee status, the Court said:

> In my opinion, a provision such as section 109 of the Czech Criminal Code can have a determining effect on the granting of refugee status only in an appropriate context. This will occur in cases where the provision, either in itself or in the manner in which it is applied, is likely to add to the series of discriminatory measures to which a claimant has been subjected for a reason provided in the Convention, so that persecution may be found in the general way in which he is treated by his country…

[22] Nor does the fact that the law may be one of general application end the inquiry. Where the punishment or consequences are completely disproportionate to the objective of the law, it may be persecutory, as the Court of Appeal noted in *Cheung v Canada*, [1993] 2 FC 314:

> … if the punishment or treatment under a law of general application is so Draconian as to be completely disproportionate to the objective of the law, it may be viewed as persecutory. This is so regardless of whether the intent of the punishment or treatment is persecution. Cloaking persecution with a veneer of legality does not render it less persecutory.

[23] The Court in *Castaneda*, found that the Board failed to consider elements of extrajudicial punishment beyond the risk of imprisonment, and that the Board's failure to do so was an erroneous application of *Valentin*. The critical aspect of Justice Simon Noel's reasoning in *Castaneda* is:

> However, as I read the *Valentin* decision, the isolated nature of the sentence and the lack of direct relationship between the sentence and the offender's political opinion were determinative factors in the minds of the Appeal justices. Here, the evidence of repercussions over and beyond the statutory sentence suggests an element of repetition and relentlessness in the manner in which the Cuban authorities treat the Applicant's family as well as a direct link between the Applicant's act of defiance and the treatment afforded to his family…

[24] In the case before the Board, there was evidence of consequences that arguably met the criteria articulated in *Castaneda* and the failure to examine these collateral consequences, as required, is an error of law.

[25] The second ground upon which this application is granted is the failure of the Board to consider the claim as a *sur place* claim. The *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* describes two situations in which a *sur place* claim may arise. The first, due to a change in circumstances in the country of origin while the claimant is abroad, is not germane. The second circumstance however, is:

> A person may become a refugee "sur place" as a result of this own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities.

[26] The Board framed its analysis of the case entirely in the context of breach of the exit laws. However, as noted on the evidence before the Board, the events that precipitated the claim were not the overstay of the exit visa, which still had over two month remaining; rather, the events that precipitated the reaction of the Cuban government and the applicants' claim arose prior to the expiry of the visa. It is true that given the passage of time, the applicant became in breach of his visa, but the catalyst for the claim for protection, according to the evidence, was the letter from the Cuban government. For this reason, the claim requires analysis both as a *sur place* claim and as a breach of exit visa case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision of the Board is set aside and the matter remitted to the Refugee Protection Division of the Immigration Refugee Board for reconsideration before a different member of the Board.

3. No question arises for certification.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Rekha P. McNutt Jean Munn	FOR THE APPLICANTS
Camille Audain	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Caron & Partners LLP Calgary, Alberta	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General Canada Edmonton, Alberta	FOR THE RESPONDENT