Federal Court  Cour fédérale

Date: 20111219

Docket: IMM-536-11

Citation: 2011 FC 1496

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 19, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

LINARES MORALES, Samuel

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION OF CANADA

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 (IRPA), of a decision dated December 9, 2010, by the Refugee Protection Division of the Immigration and Refugee Board (panel), rejecting the

refugee claim on the ground that the applicant lacks credibility and that there is no credible basis for the claim pursuant to subsection 107(2) of the IRPA.

I. Facts

[2] The applicant, who was born on February 16, 1973, is a citizen of Mexico. All of his problems apparently began after he lost his military service book in 1994. A few months later, in September of that year, he allegedly received a notice to appear as part of an investigation on October 6 concerning thefts he apparently committed. Being innocent, he appeared on the date and at the place agreed upon, and found out that a person named Torres had reportedly assumed his identity while being involved with an automobile theft ring. All of the members of the ring had been arrested, aside from this individual. No charge was laid against the applicant, who said that he thought the matter was closed, even though the police told him that the investigation would continue.

[3] In September 1997, the applicant apparently received another notice to appear relating to further theft charges. This time, the notice came from the office of the Attorney General for the State of Morelos, and not the Federal District of Mexico like the first time. The applicant initially said that he had not appeared, without any measures being taken against him following his failure to appear. In his testimony, however, he finally said that he did appear in order to clarify the situation.

[4] The applicant states that, still in 1997, he learned that the individual who had assumed his identity was aware of his existence. He contends that he was followed wherever he went in the country.

[5] On July 4, 2007, the applicant says that he was savagely beaten by Torres and his accomplices, who apparently left him for dead. On August 11, 2007, Torres and his men allegedly threatened him again with death if he filed a complaint against them.

[6] Fearing for his life, the applicant reportedly fled Mexico for Canada, where he claimed refugee protection upon his arrival.

II. Impugned decision

[7] The panel noted that the applicant was "not at all a credible witness" (para 103); "[h]e tried several times to mislead the panel with contradictory statements and with unsatisfactory, and therefore ineffectual, explanations, in order to salvage a testimony that was full of implausibilities" (para 77). At the same time, it also noted that Mr. Morales was an "opportunistic witness, ready to say one thing and then the opposite because, in reality, he never experienced the problems with identity theft that he alleged when he was living in Mexico" (para 83). Finally, the panel noted "if the claimant had experienced all of these events as he alleged, he would have given one single version of the facts throughout his testimony" (para 90).

[8] The panel identified, in the applicant's testimony, several implausibilities and contradictions on central elements of his claim which seriously undermine his credibility. Here are several examples:

a. The implausibility of the behaviour of the applicant's alleged persecutors who, although they had already allegedly been arrested by the Mexican authorities on two occasions, apparently took the additional risk of being arrested again by showing up

at the applicant's home, threatening him with death and assaulting him, simply because he apparently had learned of the existence of Torres and they were afraid that he would report them, especially since the applicant had never tried to report them;

b. The implausibility of the behaviour of the applicant, who says that he feared for his life, but apparently never tried to seek other remedies available in Mexico to obtain his country's protection, claiming that he did not trust them, even though he had obtained their protection in 1994 and the authorities apparently arrested these alleged persecutors on two occasions;

c. The implausibility of having received two notices to appear at different places and at addresses where he was not residing;

d. The failure to mention, in his Personal Information Form (PIF), his attempt to file a complaint with a police officer in the State of Morelos following the assault he suffered in July 2007, even though question 31 explicitly provides that all essential elements of the refugee protection claim must be included, specifically the steps taken to obtain state protection and the result;

e. The late mention of the fact that he allegedly reported to the Federal District authorities after receiving the notice to appear in 1997 in order to clarify and resolve his situation when he had previously stated at least six or seven times that he had never gone to the authorities when he received the second notice to appear. Similarly, the applicant indicated several times that he had done nothing to regularize his situation, but then finally said that he had gone to the authorities following the second notice to request an official document exonerating him;

f. The implausibility of the statement that judicial officers had exonerated the applicant after the second notice by blindly relying on a statement by his mother that the suspect in the photo was not her son;

g. The inconsistency between the applicant's testimony and the specialized knowledge of the panel having regard to the consequences of his failure to appear following the second notice. The applicant said that he was never concerned despite his failure to appear, whereas in reality an arrest warrant should have been issued against him by the authorities, according to the panel;

h. The inconsistencies between the applicant's testimony, his PIF and his statements at the point of entry to the immigration officer concerning his occupations and his addresses on certain dates.

[9] Given these many omissions, inconsistencies and contradictions, the panel rejected the documentary evidence filed by the applicant, specifically the notices to appear. It also found that there was no credible basis pursuant to subsection 107(2) of the IRPA.

III. Issues

[10] The applicant raised a certain number of arguments against the panel's decision. These claims essentially raise two issues:

i. Did the panel breach the principles of natural justice by relying on its specialized knowledge?

ii. Did the panel err in its assessment of the applicant's credibility?

IV. Analysis

a) *Did the panel breach the principles of natural justice by relying on its specialized knowledge?*

[11] The applicant claims that the panel breached the principles of natural justice and section 18 of the *Refugee Protection Division Rules*, SOR/2002-228 (Rules), by relying on its specialized knowledge without referring to verifiable or quantifiable sources, or by not giving the applicant the opportunity to make representations on the reliability and use of the knowledge. In fact, the panel referred to its own expertise with refugee protection claims from Mexico and found that the applicant should have been in possession of a document exonerating him regarding the thefts with which he was charged. The panel also found implausible the lack of consequences resulting from the applicant's failure to appear following the second notice he received. Finally, the panel relied on its specialized knowledge that the trafficking of automobiles throughout Mexico is a federal offence in criticizing the applicant for not filing a complaint with the office of the Federal Attorney General instead of a police officer in the State of Mexico.

[12] It is well established that issues of procedural fairness must be examined by applying the standard of correctness (see, for example, *Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, [2004] 3 F.C.R. 195; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392).

[13] I note first of all that the applicant was represented by counsel experienced in immigration law during his hearing before the panel. She did not object to the panel's use of its specialized knowledge and did not even request clarification from the panel as to the sources on which it relied in setting out what it considered to be established practices. I will not go so far as to say that the

applicant is now barred from raising this issue before the Court, but the fact remains that this issue is being raised late, and this can only undermine the seriousness of this argument.

[14] Second, a close reading of the decision shows that the implausibility finding was based on the absence of any attempt by the applicant to clear himself of all the charges concerning which he was called to appear, and not on his failure to submit a document from the authorities exonerating him. It is true that during the hearing, the panel referred several times to its specialized knowledge of various aspects of the applicant's claim. The fact remains that in the reasons for the decision, the panel referred to its specialized knowledge only with respect to a single subject: the applicant's failure to appear and the lack of legal consequences arising from this failure to appear.

[15] A simple reading of the notices to appear issued in 1994 and 1997 shows that a failure to appear on the date indicated can result in the taking of legal action. Consequently, the panel was entirely justified in questioning the credibility of the applicant, who stated that he was not concerned after his failure to appear in 1997. What is more, the applicant cannot claim that he was taken by surprise when questioned on this subject, since he was presumed to be familiar with the terms of the notices to appear.

[16] Finally, the Court agrees with the respondent's argument that section 18 of the Rules and paragraph 170(*i*) of the IRPA do not apply in this case. These provisions do not apply to documents that were adduced into evidence, but rather only to information that arises from the panel's specialized knowledge. In this case, it appears from panel's reasons that its finding that the crimes committed by a gang of criminals operating throughout Mexico fall under federal jurisdiction is

based on the objective documentary evidence. In fact, the panel referred explicitly to the National Documentation Package on Mexico dated September 29, 2010, at paragraph 35 of its reasons with respect to this issue; the applicant therefore cannot claim to be aggrieved, since this documentation was disclosed to him.

[17] Even supposing that the panel did rely on its specialized knowledge to question certain aspects of the applicant's account, this would not be fatal. In fact, the panel relied on many other irregularities, implausibilities, omissions and contradictions to find that the applicant lacked credibility. In such circumstances, the failure to respect section 18 of the Rules must be reviewed based on the record as a whole, as Justice Simon Noël pointed out in *Kabedi v. The Minister of Citizenship and Immigration*, 2004 FC 442:

> [14] Keeping in mind the failure to respect Rule 18, it is important to review the Board's decision in such a way as to assess the remaining findings. In other words, to determine whether the other findings if they stand on their own, are sufficient to uphold the Board's conclusion of non credibility, or whether the breach of Rule 18 is sufficient to set aside the decision. (See *Lin v. Canada (Minister of Citizenship and Immigration)* 1999 F.C.J. no. 1148, page 4, paragraph 21 and 23)

See also *Singh v. The Minister of Citizenship and Immigration*, 2009 FC 1070 at paragraphs 12 and 13.

[18] For the foregoing reasons, I am of the opinion that the panel did not breach the rules of natural justice.

b) *Did the panel err in its assessment of the applicant's credibility?*

[19] The applicant raised several arguments to try to demonstrate the unreasonableness of the panel's decision. First, he alleges that he was treated from the outset as a non-credible witness, simply because he could not produce a document exonerating him from the offences with which he had been charged. This apparently led the panel to reject the two notices to appear that he produced, as well as three other documents, without explaining why they could not constitute credible evidence corroborating his allegations.

[20] It is true that an applicant's testimony must be presumed true unless there are valid reasons for rebutting that presumption (*Maldonado v. The Minister of Employment and Immigration*, [1980] 2 F.C. 302 at page 305 (C.A.)). That being said, it was open to the panel to question the applicant to assess his credibility. The presumption of truthfulness does not exempt an applicant's evidence from the panel's assessment. In other words, an applicant will be given the benefit of the doubt only to the extent that the panel is satisfied with the applicant's credibility and has examined all of the evidence. In that respect, the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* specifies the following:

> 203. . . . it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.
>
> 204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.

See also *Chan v. Canada (M.E.I.)*, [1995] 3 S.C.R. 593 at para 47.

[21] Given the many inconsistencies and contradictions in the applicant's testimony identified above, it was open to the panel to not give him the benefit of the doubt. Therefore, the panel was also entitled to attach little probative value to the documents adduced into evidence by the applicant. A non-credibility finding concerning central elements of a claim may extend to other elements of the claim, as the Federal Court of Appeal recognized in *Sheikh v. Canada (M.E.I.)*, [1990] 3 F.C. 238 at paragraphs 7 to 9.

[22] The applicant also contends that the panel made numerous findings that were arbitrary or not supported by the evidence. For example, he claims that he did not change his version of the facts as to whether he had appeared or not following the second notice to appear received in 1997. He also alleges that the panel made several factual errors, stating in particular that he had gone to the office of the Federal District and not to an officer of the State of Morelos to file a complaint.

[23] However, a close reading of the applicant's testimony shows that the applicant first indicated that he did not report to the authorities following the notice to appear issued in 1997, and instead hid out of fear of the change in government and the widespread corruption in the police forces (Tribunal Record, at pages 220 to 223). Then, he stated that judicial officers came to his home and spoke to his mother, who apparently convinced them that her son was not the person they were looking for (Tribunal Record, pages 230 to 233). Finally, the applicant mentioned that he had gone to the Mexico City office with his notice to appear to clarify the situation (Tribunal Record, at pages 236 to 243). Given these different versions, the panel was reasonably entitled to find that the applicant had adjusted his testimony to try to respond to its concerns.

[24] As for the factual errors allegedly made by the panel, they do not undermine the reasonableness of its findings. These are minor, inconsequential errors that do not in any way call into question the applicant's lack of credibility. Moreover, these errors can be explained, to a certain point, by the confusion, ambiguity and contradictions of the applicant's testimony. The case law clearly establishes that intervention is unwarranted in such circumstances (see, for example, *Mavi v. The Minister of Citizenship and Immigration* (January 2, 2001), IMM-2059-00 at paras 4 and 5 (F.C.); *Gan v. The Minister of Public Safety and Emergency Preparedness*, 2006 FC 1329 at paras 16 and 17; *Rivera v. The Minister of Citizenship and Immigration*, 2010 FC 570 at para 18; *Huseynova v. The Minister of Citizenship and Immigration*, 2011 FC 408 at para 7).

[25] Finally, the applicant contends that the panel erred by not giving reasons for its finding that his claim has no credible basis. This allegation cannot be accepted. In fact, the panel was not required to give separate reasons to support its finding in this regard. To the extent that the panel had no credible evidence available to it by which it could grant the applicant refugee or person in need of protection status, it was entitled to find that his claim has no credible basis. Relying on the Federal Court of Appeal decision in *Rahaman v. Canada (Minister of Citizenship and Immigration)*, [2002] 3 F.C. 537, Justice Pelletier wrote in this regard in *Kanvathipillai v. The Minister of Citizenship and Immigration*, 2002 FCT 881, at paragraph 32:

> . . . Where a panel of the CRDD assesses all of the evidence in a case, including oral and documentary, it's reasons for concluding that there is no trust worthy evidence supporting the applicants' claim will necessarily disclose the basis of its conclusion as to "no credible basis". Consequently, I conclude that adherence to the test set out by the Court of Appeal as to the basis upon which the CRDD may make a finding of "no credible basis" for a claim will obviate the need for distinct reasons justifying such a finding.

[26] For all of the foregoing reasons, I am therefore of the opinion that the application for judicial review must be dismissed.

JUDGMENT

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

"Yves de Montigny"
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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