Federal Court  Cour fédérale

Date: 20120222

Docket: IMM-553-11

Citation: 2011 FC 1487

Toronto, Ontario, February 22, 2012

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

[AB], [CD], [EF], [GH], [IJ], [KL]

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION **Respondent**

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] AB, and his wife, KL, along with their son, CD, their daughter, EF, their son-in-law, IJ, and their granddaughter, GH, applied for refugee protection in Canada based on their fear of a corrupt public official in Mexico. A panel of the Immigration and Refugee Board denied their claims because of a lack of connection to the grounds recognized by the Refugee Convention and because state protection was available to them in Mexico.

[2] The applicants argue that the Board treated them unfairly by denying them an adjournment, and wrongly concluded that state protection was available to them in Mexico. In my view, the Board did not proceed unfairly and it did not err in its analysis of state protection. I must, therefore, dismiss this application for judicial review.

[3] There are two issues. First, did the Board unfairly deny the applicants an adjournment? Second, did the Board err in its analysis of state protection?

II. Factual Background

[4] The applicants are all citizens of Mexico. They claim to fear a corrupt individual who threatened them, used his influence to have some of them arrested on false pretences, and had AB dismissed from his job.

[5] AB is an architect. In 1999 he became involved with the political activities of Mr. X, a judge in the Office of Vital Statistics. AB volunteered to assist with Mr. X's campaign for election to public office, and eventually became its coordinator. AB claims that Mr. X began to tell him about various illegal activities in which he was involved, including insurance fraud and money laundering.

[6] AB feared Mr. X, but continued working for him until the date of an upcoming election. In June 2002, Mr. X was not elected and went back to work with the Office of Vital Statistics.

[7] Two months later, Mr. X contacted AB to discuss a joint venture in a construction company. AB felt he had no option. However, on the day they were to meet, AB decided not to attend, and he did not answer his phone when Mr. X called him.

[8] In December 2003, KL was arrested by the police, at the behest of Mr. X, who alleged that she had stolen some tables and chairs from him. After her release, the applicants retained a lawyer and filed a complaint of abuse of power with the Mexican Human Rights Commission and the Public Ministry. Their complaint was investigated but they did not have enough evidence to support it.

[9] AB and KL were re-arrested in 2005 for the same offence, and were released on bail. They were ultimately acquitted of the charges for lack of evidence. Later, they received random death threats from unknown persons by telephone. They believed that someone was watching their house.

[10] AB believes he lost his job because Mr. X informed his employer about his arrest. AB launched a claim for unjust dismissal.

[11] In 2008, the applicants claim that someone fired shots at their house, but no one was injured. The next day, Mr. X allegedly came to their house and threatened to harm the family unless AB returned to work for him. AB told him that he needed a few months to wrap up his business affairs but that after that he would return.

[12] AB and his son, CD, then made arrangements to leave Mexico and arrived in Canada in October 2008. Rodrigo fled to Canada the next month, and his wife and daughter joined him in February 2009.

[13] The applicants say that the reason they did not leave all at once was because they could not afford to do so. The female members of the family, not wanting to leave by themselves, allowed the male members to leave first. In fact, KL did not want to leave Mexico at all. However, after relocating to Guadalajara, she found out that someone was asking if she was married to AB. At that point, she believed she was under surveillance, and realized that she could not stay in Mexico any longer. She flew to the U.S. before entering Canada in December 2009.

[14] The applicants were given a notice to appear dated October 27, 2010, advising them that their hearing before the Board was scheduled for December 20, 2010. On November 26, 2010, they requested a postponement to give them more time to retain counsel and get certain documents translated for use before the Board. Their request was denied.

[15] When they appeared before the Board, the applicants again requested an adjournment, on the same grounds. The Board stated that it had considered all of the factors listed in s 48(4) of the *Refugee Protection Division Rules*, SOR/2002-227 [Rules] but that the hearing should proceed. The Board advised the applicants that if their credibility became an issue, they could submit additional documents after the hearing.

III. The Board's Decision

[16] The Board concluded that the applicants were not Convention refugees because their fear was not based on one of the five grounds recognized under the Refugee Convention. The applicants do not challenge that conclusion.

[17] The Board then considered their claims under s 97(1)(*b*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. It assumed, without deciding, that the applicants were credible. The determinative issue was state protection.

[18] The Board noted that the onus was on the applicants to produce clear and convincing evidence of their state's inability to protect them. A subjective reluctance to access state protection is not enough.

[19] In the case of KL, the Board accepted that her arrest was likely an "extremely emotional experience". However, it was difficult to determine whether there were reasonable or probable grounds for it. Further, she had been released without conditions, and with the assistance of a lawyer, the matter did not proceed.

[20] With respect to their human rights complaint, the Board noted that their allegations had been investigated, but there was insufficient evidence to support them. The Board was unable to determine the adequacy of this investigation.

[21] With respect to the applicants' arrest in 2005, the Board again noted that they had been acquitted and released.

[22] The Board pointed out that AB had not gone to the police when he first realized that Mr. X was a criminal. Nor did he report any of the telephone threats to the police or report the shooting that took place. He explained that after the outcome of the human rights investigation, he had no faith in the authorities and believed that he would be placing himself and his family in greater danger if he reported these events. However, given their releases and acquittals after the prior arrests, there was no objective support for the applicants' subjective belief that the justice system would not work for them.

[23] The Board considered the available documentary evidence, including a U.S. DOS Report, which reported that:

- Mexico is a democracy with free and fair elections;
- There is a relatively independent and impartial judiciary;
- Mexican security forces are described as hierarchical;
- In the event of irregularities committed by government officials, complaints can be submitted to the Office of the Inspector General, or the Internal Investigations Department of the Office of the Attorney General;
- Other avenues for members of the public aggrieved by a corrupt official or security forces include the Human Rights Commission, or the Secretary of Public Administration. Complaints can be made in person, by phone, email or regular mail;
- While corruption is a problem within parts of the Mexican administration, there are ongoing efforts to purge corruption, and there is a 24-hour hotline to report corrupt officials;
- In January 2009 new legislation was enacted requiring the vetting of every member of the country's police forces using a series of testing mechanisms;

- There are reports of arrests by the police and military of corrupt officials.

[24] The Board concluded that the Mexican government is taking significant steps to deal with corruption and to provide mechanisms for the public to report crimes and corruption within the system. It also found that state protection was available to the claimants on previous occasions and that there was no credible evidence that similarly situated persons did not receive state protection. The Board found that there was no clear and convincing proof of Mexico's inability to protect the applicants.

[25] The Board also commented on the claimants' apparent lack of subjective fear. It found that if they had truly feared for their lives, it was unlikely that the male members of the family would have fled first, leaving behind the female members.

[26] For the above reasons, the Board found that the applicants were not persons in need of protection.

IV. Issue One - Did the Board unfairly deny the applicants an adjournment?

[27] The applicants allege that the Board breached its duty of procedural fairness by: (a) refusing a pre-hearing request for a postponement; (b) providing inadequate reasons for refusing an adjournment request at the hearing; and (c) failing to meet a legitimate expectation.

[28] The applicants submit that the Board erred by failing to discuss any of the relevant factors listed in s 48(4) of the Rules. The Board simply stated that it had considered those factors but its reasons did not refer to them. The applicants contend that the factors listed in s 48(4), when properly considered, show that the Board's refusal to adjourn was unreasonable and unfair:

- They had made efforts to be ready, as translation was started before the hearing and was underway, and they were attempting to get more evidence from Mexico;
- They were not represented by counsel;
- There were no prior delays in this matter;
- They were only seeking a short delay to finish translation and retain counsel.

[29] In addition, the applicants submit that they had a legitimate expectation that they could submit further evidence after the hearing if credibility was an issue. In particular, the Board seems to have made a credibility finding in respect of their lack of subjective fear. Therefore, it should have provided them an opportunity to submit documents after the hearing: *Bayrami v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1167 (TD), at paras 5-6.

[30] In my view, the Board did not treat the applicants unfairly. The Board was not required to go through each factor listed in s 48(4) of the Rules (*Omeyaka v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 78, at para 29). Rather, it must demonstrate that it has considered the factors that would support an adjournment request.

[31] Here, the applicants wanted an adjournment in order to be able to adduce corroborative documentary evidence of their narrative and KL's psychological condition. They had had considerable time to assemble the evidence they required, and they had confirmed their readiness

for the hearing. In any event, this evidence was directed at points that were not in dispute. Further, any expectation created by the Board was limited to the specific circumstance where credibility was in issue, and that circumstance did not arise. As for the question of the applicants' subjective fear, this was no longer a live issue by the time the Board rendered its decision. I address this point below.

V. Issue Two – Did the Board err in its analysis of state protection?

[32] The applicants submit that the Board erred in finding that state protection would have been reasonably forthcoming to them. In particular, the applicants maintain that the Board was required to consider the profile of their persecutor. Mr. X was an influential government official.

[33] The applicants also claim that the Board erred in its analysis of the efficacy of state protection by failing to recognize the inability of the state of Mexico to respond to criminality.

[34] Finally, the applicants submit that the Board erred in finding that they did not have a subjective fear of persecution. They suggest that this amounted to a veiled credibility finding: *Moreno v Canada (Minister of Citizenship and Immigration)*, 2010 FC 993, at paras 12-13.

[35] In my view, the Board's analysis of state protection was reasonable. The applicants shouldered the burden of showing they had a well-founded fear of persecution and of adducing clear and convincing evidence of a lack of state protection.

[36] The evidence showed that the applicants had never sought any protection from police and did not consider the other avenues available to them. Further, the evidence about their experiences with the justice system and other authorities supported the Board's conclusion that the system had provided a measure of protection to them in the past. Their evidence merely suggested a subjective reluctance to approach the police or other authorities for protection.

[37] In addition, the Board did not fail to consider the profile of their persecutor or the specific nature of the harms they feared. The Board specifically referred to the status of the agent of persecution and the nature of his threats. However, it also reviewed the documentary evidence showing there were agencies and authorities in Mexico that could provide protection and recourse against corrupt officials.

[38] With respect to the applicants' complaints about the Board's comments on subjective fear, the Board stated that it had accepted the applicants' testimony as credible. However, it also suggested that their actions in leaving Mexico did not demonstrate that they had a genuine fear of persecution. This conclusion was superfluous to the s 97 analysis (the s 96 claim had already been dismissed). As I noted in *Prasad v Canada (Minister of Citizenship and Immigration)*, 2011 FC 559, at para 13:

> Given that the Federal Court of Appeal has clearly found that s. 97 contains only an objective component (*Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at para 33), I cannot conclude that the Board erred by not making a definitive finding about the credibility of the applicants' subjective fear. At the same time, I agree with Justice Mainville [in *Flores v Canada (Minister of Citizenship and Immigration)*, 2010 FC 503] that state protection should not be analyzed in a vacuum. The nature of the applicant's fear should be at least identified and the capacity and the will of the state to respond to the applicant's circumstances should be then analyzed.

[39] Therefore, any error on the Board's part with respect to subjective fear could not have affected the outcome.

VI. Conclusion and Disposition

[40] The Board did not treat the applicants unfairly when it denied them an adjournment. Its conclusion on state protection was reasonable – intelligible, transparent, and a defensible outcome based on the facts and the law. Accordingly, I must dismiss this application for judicial review. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"James W. O'Reilly"
Judge

Annex “A”

Refugee Protection Division Rules, SOR/2002-228	*Règle de la Section de la protection des réfugiés*, DORS/2002-228
Application to change the date or time of a proceeding	Demande de changement de la date ou de l’heure d’une procédure
Factors	Éléments à considérer
48.(4) In deciding the application, the Division must consider any relevant factors, including	**48**.(4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :
(*a*) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;	*a*) dans le cas où elle a fixé la date et l’heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;
(*b*) when the party made the application;	*b*) le moment auquel la demande a été faite;
(*c*) the time the party has had to prepare for the proceeding;	*c*) le temps dont la partie a disposé pour se préparer;
(*d*) the efforts made by the party to be ready to start or continue the proceeding;	*d*) les efforts qu’elle a faits pour être prête à commencer ou à poursuivre la procédure;
(*e*) in the case of a party who wants more time to obtain information in support of the party’s arguments, the ability of the Division to proceed in the absence of that information without causing an injustice;	*e*) dans le cas où la partie a besoin d’un délai supplémentaire pour obtenir des renseignements appuyant ses arguments, la possibilité d’aller de l’avant en l’absence de ces renseignements sans causer une injustice;
(*f*) whether the party has counsel;	*f*) si la partie est représentée;
(*g*) the knowledge and experience of any counsel who represents the party;	*g*) dans le cas où la partie est représentée, les connaissances et l’expérience de son conseil;
(*h*) any previous delays and the reasons for them;	*h*) tout report antérieur et sa justification;
(*i*) whether the date and time fixed were peremptory;	*i*) si la date et l’heure qui avaient été fixées étaient péremptoires;
(*j*) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice; and	*j*) si le fait d’accueillir la demande ralentirait

(*k*) the nature and complexity of the matter to be heard.

l'affaire de manière déraisonnable ou causerait vraisemblablement une injustice;

k) la nature et la complexité de l'affaire.

Immigration and Refugee Protection Act, SC 2001, c 27

Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT

SOLICITORS OF RECORD

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