Federal Court  Cour fédérale

Date: 20140527

Docket: IMM-3881-13

Citation: 2014 FC 512

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 27, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ISAAC EMMANUEL MEDINA TORRES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] **CONSIDERING** the application for judicial review of a decision by the Refugee Protection Division (RPD) of the Immigration and Refugee Board dated April 10, 2013;

[2] **CONSIDERING** that the RPD refused to proceed with an application made pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act);

[3] **CONSIDERING** that this is an application for judicial review under section 72 of the Act;

[4] **CONSIDERING** the parties' submissions and having examined the record, the Court has concluded that the application for judicial review must be dismissed and announced this finding at the hearing on May 22. Here are my brief reasons.

[5] The applicant, a citizen of Mexico, claimed the status of a refugee and person in need of protection, stating that he feared a drug dealer and his accomplices.

[6] He recounted that he had been working as an assistant operator at the General Lazaro Cardenas refinery. His problems reportedly started on October 23, 2010, when, at about three in the morning, he and three of his friends were assaulted at a nightclub by seven drunken individuals. The brawl continued outside. On November 5, one of the applicant's friends was accused of injuring the eye of someone named Jerson or Gerson during the altercation.

[7] This person's family was claiming 150,000 pesos in damages. The friend allegedly paid the money on November 18, 2010, and signed a document absolving his three friends of any responsibility. However, Jerson was a drug trafficker, and the applicant feared he would not forget the incident. Indeed, according to his narrative, in November 2010 Jerson and some

accomplices had parked in front of his home, lying in wait, and that same week someone delivered two death threats in writing to his house. He did not keep these.

[8] He further added that he received threats by telephone during the second week of November. At the hearing he recounted an incident during which a black pickup truck pulled up alongside him and the passenger inside pointed a weapon at him and threatened him with death.

[9] He claimed to have filed a complaint with the public prosecutor's office in December 2010, but the person in the office did not write up a report because the applicant was unable to provide details, such as the names of the individuals or the licence plate number of the pickup truck. The official merely took note of the incident without adding it to the official records. A subsequent telephone threat purportedly included the statement [TRANSLATION] "we are the Zetas and we are everywhere; we are going to kill you."

[10] In December the applicant fled to his sister's and later to an uncle's, abandoning his job. An uncle who had previously visited Canada advised him to leave the country for a while to hide from the Zetas.

[11] He filed two applications for a visa to come to Canada, with the first one from January 26, 2011, being denied, and the second one, from April 28, 2011, being accepted. In the second application he affirmed that he was still working at the refinery; at the hearing he acknowledged that this was not true but explained that he thought he would not receive a visa if

he had no money or was not working. He also stated having characterized his trip to Canada as a sightseeing and pleasure trip.

[12] He arrived in Montréal on June 26, 2011. He only claimed refugee protection four months later.

[13] The RPD found the applicant not to be credible, his testimony being tarnished by numerous contradictions with his written narrative. These are well-documented and explained in the decision under review. Thus, the applicant could not recall the month in which the incidents he recounted had occurred, placing the incidents in November when he had previously stated that they had occurred in December. He invoked translation errors, which led the panel to provide him with the original Spanish version of his narrative, at which point he declared that he was confused. When the panel raised the contradiction between his initial statement that he was still working at the refinery in April 2011 and his story about having hidden out at his sister's and uncle's, he explained that he was referring to a contractual rather than a work period, an explanation the panel did not accept.

[14] Although the applicant testified having been assaulted during the second week of November 2010, which allegedly prompted him to leave, the Personal Information Form refers rather to a summons to appear on November 11 as being the catalyst. The death threats he is purported to have received that same week are not even mentioned in the Personal Information Form.

[15] The applicant had explained the reason for his visa application as being to "visit Montréal, visit its museums, and have fun". Four months after his arrival, he claimed refugee protection in Canada. He explained this delay at the hearing by stating that at first he did not know he could make a claim for refugee protection, although the member noted that he stated that his uncle had recommended that he come to Canada for his safety.

[16] The RPD came to the conclusion that the applicant's testimony was not credible; having the burden of proof, he had in no way shown that he was a refugee or a person in need of protection.

[17] The two issues in this case are whether there is a reasonable apprehension of bias and whether the RPD's conclusion is reasonable. At the hearing, the applicant's counsel devoted all of his arguments to the first issue.

[18] The standard of review for matters of procedural fairness is correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 (*Dunsmuir*) and *Sketchley v Canada (Attorney General)*, [2006] 3 FCR 392; 2005 FCA 404 (*Sketchley*)). As for issues of credibility and sufficiency of evidence, these are reviewable on a standard of reasonableness.

[19] The allegation that there was a breach of procedural fairness arising from a reasonable apprehension of bias on the part of the RPD, a serious allegation, is not supported by any evidence. At best, the applicant's counsel stated that he had successfully used the same type of argument against the same member in one case and that a similar finding had been made in

another matter. He pointed out two comments in the transcript that could be viewed as being sarcastic.

[20] This allegation must be demonstrated. An analysis of apprehended bias must be carried out on the basis of the circumstances and context of each case (*Wewaykum Indian Band v Canada*, [2003] 2 SCR 259; 2003 SCC 45, at paragraph 77).

[21] In addition, the issue must be raised in the early stages. The Federal Court of Appeal characterized this duty in the following terms in *Kozak v Canada (Minister of Citizenship and Immigration)*, [2006] 4 FCR 377; 2006 FCA 124 at paragraph 66:

> [66] Parties are not normally able to complain of a breach of the duty of procedural fairness by an administrative tribunal if they did not raise it at the earliest reasonable moment. A party cannot wait until it has lost before crying foul.

[22] In this case, the counsel acting on behalf of the applicant did not request a recusal either before the RPD or before this Court and the applicant did not raise any issue at the time of the hearing. The mere existence of a case in which counsel successfully argued the facts in circumstances where there was an apparent reasonable apprehension of bias is in no way sufficient to establish that there was bias or a reasonable apprehension of bias in another matter. Counsel for the applicant was inferring that there was a certain amount of animosity that was expressed in the first matter. My reading to the transcript of the hearing confirms no such animosity. In fact, the applicant's version was sufficiently flawed that it warranted questioning by the RPD.

[23] As for the reasonableness of the decision, the role of a reviewing judge is not to substitute his or her own vision of the facts, but rather to ensure that the decision lies within the realm of reasonableness as set out in *Dunsmuir*:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> (Para 47)

[24] I am of the view that the RPD's findings with regard to credibility are entirely reasonable. The applicant had no acceptable explanation for the inconsistencies and contradictions that undermined his testimony. His narrative was not credible and he was unable to meet the burden of proof that was incumbent upon him. The panel's reasoning was justified, transparent and intelligible.

[25] Similarly, the delay in claiming refugee protection, while not determinative, could have been considered. The applicant filed a visa application in which he stated that he wished to do some sightseeing ("visit Montréal, visit its museums, and have fun", RPD decision, para 20), yet he claimed to be under serious threat and, four months after his arrival, made a claim for refugee status. When you add the fact that his version of the facts, which are not complex, is far from being clear due to the inconsistencies and contradictions carefully noted by the RPD, one can only conclude that the decision is reasonable.

[26] At the outset, the applicant's counsel indicated that he had not had contact with the applicant for at least four months. In the finest tradition of the Bar, he nonetheless pleaded the

case on the basis of the memorandum upon which the application for leave and judicial review had been allowed. He did the utmost to serve his client in the best way possible in the circumstances.

[27] Accordingly, the application for judicial review is dismissed. No serious question of general importance was proposed by the parties and there is no question to certify.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. There is no question for certification.

"Yvan Roy"

Judge

Certified true translation,
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3881-13
STYLE OF CAUSE:	ISAAC EMMANUEL MEDINA TORRES v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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