Federal Court  Cour fédérale

Date: 20110106

Docket: IMM-2380-10

Citation: 2011 FC 9

Ottawa, Ontario, this 6th day of January 2011

Before: **The Honourable Mr. Justice Pinard**

BETWEEN:

VICTOR ADRIAN BECERRA VAZQUEZ

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 a member of the Immigration and Refugee Board (the "Board"), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27, (the "Act") by Victor Adrian Becerra Vazquez (the "applicant"). The Board determined that the applicant was neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the Act.

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[2] The applicant is a citizen of Mexico, from the city of Leon, Guanajuato. The basis of his refugee claim is that he allegedly worked for a newspaper, *"A.M."*, whose owner was engaged in property speculation on land which he owned to the south of Leon. The Secretary-General of Guanajuato wanted to develop land to the north of the city instead, and a dispute between them was ongoing. The applicant, who alleges that he was a copy editor and not a reporter, was sent undercover to a meeting involving the Secretary-General in order to surreptitiously record the proceedings. He alleges that he was discovered and told that he would regret it if he were to allow the information to be published. The newspaper subsequently published the story, and the newspaper owner also registered a complaint against the Secretary-General with the Mexican Human Rights Commission.

[3] The applicant alleges that after these incidents, he was the victim of an attempted murder, in which two shots were fired at his car while he was inside it. He returned to his place of work, where he did not tell his colleagues about the incident but chose to phone the police. When the promised police patrol did not materialize, the applicant allegedly decided not to pursue the issue further because he had serious doubts about the effectiveness of the police force.

[4] The applicant left the country and came to Canada. He alleges that he spoke little English at the time. Upon his arrival, he was questioned by an immigration officer without the aid of an interpreter. The officer recorded in the Point of Entry ("POE") notes that the applicant was a reporter.

[5] The applicant was represented at his hearing by his former counsel. In his testimony, he explained that he had not only been working full-time at the newspaper, but had also been completing a university degree in his remaining time.

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[6] The Board's decision was based entirely on a lack of credibility. This conclusion was in turn based on five main findings.

[7] The first credibility issue was the applicant's testimony regarding his job title and duties at the newspaper. The Board states that the applicant testified that his role was "surveiller le contenu des éditoriaux". The Board questioned him on this subject and determined that the applicant did not know what an editorial article was, in that he stated that it was simply the portion of the newspaper where journalists wrote articles, which did not accord with the definition of an editorial in *Le Petit Robert*. The Board found that this demonstrated a lack of knowledge of a business in which he had supposedly been engaged for five years.

[8] The second credibility issue was the discrepancy between the POE notes and the applicant's testimony regarding his job. The Board noted that the POE notes indicate that the applicant had declared himself to be a reporter who had published articles against the government. The Board noted that in his testimony, the applicant indicated that he was not a reporter and had merely stated that he had difficulties because of an article he had been involved with. The Board considered the applicant's explanation that most laymen equate working for a newspaper with being a reporter, but

did not believe the applicant on this point. The Board found that as the applicant had stated that he spoke English at the time the POE notes were made, he must have declared himself to be a reporter. The Board relied partly on this point to conclude that the applicant was lying about his employment.

[9] The third credibility issue was the letter submitted from *A.M.* stating that the applicant had worked for them for five years. The Board took issue with the late submission of this letter, noting that the Personal Information Form ("PIF") clearly states that all supporting documentation should be immediately submitted, and noting that the applicant had thereby chosen not to submit the only document corroborating the story that he worked for a newspaper. The Board rejected the applicant's explanation that an interpreter at his then-lawyer's office had told him to submit the letter just before the hearing. The Board also determined that fraudulent documents are easily obtained in Mexico, and thereby accorded no probative value to the letter.

[10] Fourthly, the Board did not believe the applicant's statements to the effect that he had been pursuing a university degree while working full-time at the newspaper. The Board noted the applicant's testimony that he worked 40 hours a week for *A.M.* while taking five courses per semester over the course of five years. The Board did not believe that this was likely.

[11] The final credibility issue was the applicant's conduct following the alleged murder attempt. The Board noted that there was no corroborating evidence for this story. The Board questioned why the applicant had not immediately informed his employer of the incident, and why he called the police at all if he supposedly had no faith in them. The Board did not believe the applicant's explanation that he was in shock and could not think of what to do other than phone the police.

[12] The Board thereby concluded that the applicant had invented the entire story.

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[13] The main issue in this application is whether the Board's conclusions regarding credibility are unreasonable.

[14] The standard of review applicable to a Board's finding on credibility is reasonableness, according to *Nijjer v. The Minister of Citizenship and Immigration*, 2009 FC 1259, paragraph 12, and *Sukhu v. The Minister of Citizenship and Immigration*, 2008 FC 427, paragraph 15. Therefore, the Board's conclusion must fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 47).

[15] The applicant also raised an issue with respect to procedural fairness, to which the standard of correctness applies (*Canada (Minister of Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at paragraph 43).

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[16] Dealing with the question of credibility:

i) The meaning of "éditorial"

[17] The applicant protests the Board's reliance on the discussion of the word "éditorial", and argues that the Board's conclusions in this regard were unreasonable. The applicant contends that the Board's line of reasoning demonstrates the Board's own lack of knowledge, not the applicant's. The applicant notes that what he was explaining was the difference between "advertising copy" and "editorial copy" in a newspaper, the latter being any copy written by the newspaper's writers, and argues that at no point did he say that he wrote opinion-style "editorials" or supervised others doing the same. The applicant argues that his testimony shows that his role was to supervise "editorial copy", that is, the portion of the newspaper written by its employees. The applicant notes that the transcript shows that he testified regarding the "contenu éditorial", being "la partie du journal où on écrit", while the Board fixated on "un éditorial".

[18] The respondent disagrees with this characterization of the discussion, reiterating the Board's conclusion that the applicant displayed a lack of knowledge of his own supposed business. However, I agree with the applicant that the Board's conclusion in this regard is unreasonable. I find that the transcript, at pages 134 to 140, demonstrates that the applicant was explaining the difference between "editorial copy" and "advertising copy", and did demonstrate knowledge of this difference.

ii) Point of entry notes labeling the applicant a "reporter"

[19] The applicant submits that the Board had no proper justification to doubt the applicant's credibility on this issue, and argues that whether the applicant's job title was thought by others to be "reporter" or to fill reporter-like functions is irrelevant to the determination of this claim. The applicant testified that what he said to the officer was that he had fled "à cause d'un problème que j'avais eu à cause d'un reportage", which could have engendered the confusion. The applicant also

argues that he sufficiently explained this discrepancy, noting that he did not speak much English at the time the POE notes were taken, that the officer did not speak much Spanish, that no interpreter was present, and that people often assume newspaper workers are reporters. The applicant relies on *Kaur v. The Minister of Citizenship and Immigration*, 2006 FC 1120, for the proposition that POE notes must be looked at with caution, especially when the applicant offers a reasonable explanation for their content, and also relies on *Valtchev v. The Minister of Citizenship and Immigration*, 2001 FCT 776, at paragraph 16, for the proposition that it is unreasonable to doubt the applicant's credibility simply because he could not explain the reason for the officer's decision to label him a reporter, as he can't be expected to know the officer's mind.

[20] The respondent contends that *Kaur* is distinguishable from the present case, as in that case the applicant had objected to the POE notes in her PIF, and the notes supported the testimony rather than the Board's findings, whereas here the Board's findings faithfully represented the content of the notes. The respondent also questions the applicant's statement regarding his English abilities, noting that the officer must have relied on past experience to assess the applicant's abilities, and would have asked for an interpreter if one was needed. The respondent notes that the applicant did not object to the introduction of the POE notes.

[21] Whether or not *Kaur* is distinguishable from the present case, I find that it was unreasonable of the Board to place so much emphasis on the job title recorded by the officer in the POE notes. In my opinion the question was not one of the applicant's general English skills, but one of a specific job title, which would involve a more nuanced understanding of English, whether or not the applicant needed an interpreter for the remainder of the interview. The applicant testified that most

people will equate a newspaper employee with a reporter, and I find that it was unreasonable of the tribunal to reject the applicant's explanation, considering that his problems arose when he was acting as a reporter in recording the Secretary-General's meeting. The tribunal did not consider this explanation at all.

iii) Letter from A.M. *regarding the applicant's employment*

[22] The tribunal gave no probative value to the letter which was the only corroborative evidence of the applicant's employment, determining that the applicant was not credible and fraudulent documents are easily obtained in Mexico. The applicant argues that the tribunal acted on mere suspicion and speculation, and did not make any effort to confirm the truth of the letter's contents, which would have been easy to do considering that the letter-head included all of the contact information for *A.M.* The applicant relies on *Bao v. The Minister of Citizenship and Immigration*, 2006 FC 301, where the applicant's claim was rejected because his PIF was very similar to those of several other would-be refugees, and Justice Douglas Campbell found that the Board committed a reviewable error in basing its decision on suspicions rather than providing concrete reasons for rejecting the PIF.

[23] The applicant also argues that the Board should not have accepted the late submission of the letter and then assigned it no weight because of its lateness, especially when the applicant and his counsel took responsibility for the late submission. However, I agree with the respondent that admissibility and weight are separate issues for the Board to decide.

[24] The respondent argues that it was insufficient for the applicant to merely file the letter, affirm that it was genuine, and expect this to offset the concerns about his credibility (citing *Hamid v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 1293 (T.D.)). The respondent also relies on *Gasparyan v. The Minister of Citizenship and Immigration*, 2003 FC 863, paragraph 7, for the proposition that the Board is entitled to rely on its knowledge of the ease with which fraudulent documents can be obtained in Mexico in assigning weight to this letter.

[25] However, I am persuaded by the applicant's argument that this is circular logic on the Board's part. The evidence relied upon to discredit the letter was the applicant's lack of credibility and therefore the likelihood that he had obtained the letter fraudulently, and the applicant was also found not to be credible because he had no corroborative evidence once the letter was discredited. I find this to be unreasonable logic on the Board's part, especially where the information in the letter was easily verifiable.

iv) Applicant's university education

[26] The applicant submits that the Board's line of reasoning regarding his ability to work and study full-time was entirely speculative and without foundation. The applicant notes that adverse findings on credibility must have concrete evidentiary foundations, and not be built on mere speculation (*Buitrago v. The Minister of Citizenship and Immigration*, 2009 FC 1046, paragraph 16). The applicant contends that the tribunal has no expertise on the capabilities of the applicant, and notes that his testimony established that his grades suffered because of his heavy schedule. The applicant notes that many Canadian students work while studying full-time, and that there is no reason to believe that it is impossible for a Mexican student to do the same. The applicant refutes

the Board's conclusion that the applicant "n'aurait pas eu le temps", noting that if the applicant worked 40 hours a week and slept 7 hours a night, that still left him with over 11 hours a day in which to study.

[27] The respondent submits that the Board was entitled to assess the applicant's allegations in light of its own understanding of human behaviour (*Li v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 470 (T.D.), paragraph 9). While I question the Board's conclusion on this point, there is nothing to show that this finding of implausibility was in itself unreasonable. In combination with the Board's other credibility findings, however, the lack of evidence in support of the Board's finding (other than the Board's views on human behaviour) is troublesome.

v) Conduct of the applicant after the murder attempt

[28] The applicant argues that it was unreasonable of the Board to make an adverse credibility finding simply because the applicant called the police, in whom he had little faith, after a stressful moment, namely the attempted murder. The applicant argues that it is not unreasonable for an individual under shock and stress to do things which in hindsight seem illogical to a third party.

[29] The respondent submits that the Board had the advantage of seeing and hearing the applicant, and that based on the evidence before it the Board concluded that the applicant's alleged conduct following the attack was implausible. The respondent argues that even if the evidence could conceivably have led to a different conclusion, this Court cannot interfere unless an overriding error was made (*Oduro v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 560 (T.D.), paragraphs 11 and 12).

[30] Again, on this point I agree with the respondent that there is no reviewable error made by the Board on this particular conclusion. However, the other three errors that I have identified in the Board's credibility findings persuade me that the Board's overall conclusion regarding the applicant's credibility was tainted.

[31] Given my above disposition of the issue of credibility, which is determinative of the application for judicial review, it will not be necessary to deal with the other issue concerning procedural fairness.

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[32] For the above-mentioned reasons, the application for judicial review is allowed, the Board's decision is set aside and the matter is sent back to the Board for reconsideration by a differently constituted panel. I agree with the parties that this is not a matter for certification.

JUDGMENT

The application for judicial review is allowed. The decision of the Immigration and Refugee Board (the "Board") rendered on April 12, 2010 is set aside and the matter is sent back to a differently constituted Board for reconsideration.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-2380-10
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