Date: 20060726

Docket: IMM-6316-05

Citation: 2006 FC 921

Ottawa, Ontario, July 26, 2006

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

JOSE LUIS EFREN ZUMAYA SANCHEZ

Applicant

and

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant, a citizen of Mexico in his late 20s, claimed refugee protection on the basis of his fear of being "targeted" by drug traffickers. The Immigration and Refugee Board (Board) denied the refugee claim on the grounds that the Applicant had not rebutted the presumption in favour of the existence of state protection. This is the judicial review of that Board decision.

II. Facts

[2] The Applicant was employed in Mexico City with a company as a computer technician. Part of his duties included receiving and delivering packages containing computers. The police came to the company inquiring about certain packages the Applicant had delivered because the packages were said to contain drugs. The next day, the company shut down.

[3] A few days later the Applicant was interrogated again by the police at the police station and sent home. The following day, the Applicant says, two men forced him into a car, questioned him about the police interrogation and then beat him and threatened him and his family.

[4] Thereafter, he fled to his sister's home in Queretaro and returned to Mexico City where his U.S. visa was denied. He then left again for Queretaro. When his sister received a telephone call from the police, he fled to his aunt's home in

Toluca to look for work. He decided to leave Mexico for Canada when he saw the same car as the one into which he was forced earlier in Mexico City.

[5] As indicated earlier, the Board rejected the claim because the Applicant had failed to rebut the presumption against state protection. The Applicant had submitted some documentary evidence that suggested that the police and some judicial officials were corrupt and on the payroll of drug traffickers. This evidence was submitted to address the glaring absence on the part of the Applicant to seek the assistance of any Mexican state organizations.

[6] The Applicant raises three issues:

· the Board's rejection of the objection to reverse-order questioning;

· the effect of the failure of the Governor-in-Council to bring into force the provisions of the *Immigration and Refugee Protection Act* that create the Refugee Appeal Division; and

· the Board's finding that the Applicant had not rebutted the presumption of state protection.

III. Analysis

A. *Motion to Adjourn*

[7] The Applicant brought a motion to adjourn this hearing because the Federal Court of Appeal had under reserve the appeals in *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 8 (QL), 2006 FC 16; *Trujillo v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 595 (QL), 2006 FC 414; and *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 631 (QL), 2006 FC 461; all dealing with the issue of Guideline 7 and reverse-order questioning. In the absence of any general stay being issued by the Court of Appeal in respect of cases involving this issue and given that this case also dealt with issues other than Guideline 7, the motion to adjourn was dismissed. The adjournment would, in reality, have been a stay of proceedings.

B. *State Protection*

[8] Despite the forceful submissions and efforts of counsel to find another legal issue on which to resolve this case, the fact remains that the Board decision turned on the state protection issue.

[9] The Applicant argues that the Board failed to consider any of the five pieces of documentary evidence submitted by the Applicant related to police and judicial corruption in Mexico. It is trite law that a board does not have to refer to each piece of evidence submitted; however, it must turn its mind to important evidence or issues.

[10] While there may be some divergence in this Court on the standard of review in respect of state protection findings, as between "reasonableness" or "patent

unreasonableness", the differing standards have no particular relevance in this instance.

[11] To the extent that this Court must set a standard of review, the central issue in this case was whether the Applicant had provided "clear and convincing" proof as to state protection (or its absence). As this is the test in *Canada(Attorney General) v. Ward (F.C.A.)*, [1990] F.C.J. No. 209 (QL), [1990] 2 F.C. 667, as applied to the facts of the case, it is a matter of mixed law and fact to which the standard of review is "reasonableness".

[12] In the Board's decision, the Member did refer to documentary evidence regarding the corruption of Mexican institutions of law and order. Therefore, it is evident that the Board turned its mind to the issue - it is entitled to the presumption that it considered the relevant evidence including that of the Applicant.

[13] The Board's conclusion was, in essence, that there was no reasonable basis for concluding that the whole of the Mexican police and judicial system was so corrupt as to justify the Applicant's failure to make even one attempt to engage state protection. There is nothing unreasonable in this conclusion. On this ground alone, the judicial review should be dismissed, particularly as it is sufficiently distinct form the other issues raised as to be able to stand on its own.

C. *Guideline 7*

[14] The issues of Guideline 7 and reverse-order questioning are purely issues of law and procedural fairness. As such, they attract a standard of review of correctness. (*Canadian Union of Public Employees (C.U.P.E.) v. Ontario(Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29)

[15] The Applicant raised an objection to Guideline 7 at the Board's hearing and therefore the issue is fairly before the Court in this judicial review. Pending the Court of Appeal's decision which will address certain institutional issues concerning Guideline 7, on the basis of *Benitez*, the issues here are whether the application of Guideline 7 in this case fettered the Board's discretion and did Guideline 7 in this case amount to a breach of the principles of procedural fairness.

[16] On the facts of this case and considering the manner in which the Board dealt with the objection, particularly its consideration of whether to apply the Guidelines or not, there is no evidence that the Board fettered its discretion.

[17] As to whether Guideline 7 is a breach of the principles of procedural fairness, the Applicant has shown nothing to suggest that its rights to advance its case were impinged. Any breach of procedural fairness would be more of an institutional matter and that consideration is before the Court of Appeal.

D. *Failure of the Governor-in-Council*

[18] As I understand the Applicant's submission, it is not that the Governor-in-Council does not have authority to withhold bringing into force provisions creating

the Refugee Appeal Division, it is that, in face of the reasons for creating such a Division, the deference owed to Refugee Protection Division must be re-examined.

[19] The Applicant argued that, under the previous Act, a decision such as the one at issue, would have been made by two members and in the event of a tie, the benefit would have gone to an applicant. The legislative rationale for the Refugee Appeal Division was to provide an additional safeguard since under the new *Immigration and Refugee Protection Act*, such decisions would be made by only one member.

[20] From this, the Applicant argues that the deference given to the Board, particularly "patent unreasonableness", as found in *Pushpanathan v. Canada(Minister of Citzenship and Immigration)*, [1998] 1 S.C.R. 982, must be reconsidered. Furthermore, since Section 7 *Charter* rights may be engaged, the Court should ensure a higher standard of review where a decision is made by one member.

[21] The Applicant's argument, while extremely well presented, might have had more effect if the issue in this case turned in part on the standard of review. In this case, it did not.

[22] No matter how one applied the pragmatic and functional test to a single member decision on a matter of fact and, at best mixed law and fact, the standard of review applied to a specialized tribunal like the Immigration and Refugee Board would at best be "reasonable". As found earlier, on the issue of state protection, the Board's decision was reasonable.

[23] Therefore, the Applicant cannot succeed on this ground on these facts.

IV. Conclusion

[24] For all these reasons, this judicial review will be dismissed.

V. Certification

[25] At the conclusion of the hearing of the judicial review, the parties made submissions on whether the Court should certify questions. The Applicant wishes certification on all three issues raised.

[26] Applying the test in *Liyanagamage v. Canada(Minister of Citizenship and Immigration)* (1994), 176 N.R. 4, [1994] F.C.J. No. 1637 (QL), the only issue which may meet that test is that related to Guideline 7. While the Guideline 7 issue was not determinative of the judicial review, if Guideline 7 is contrary to law, the issue remains what effect such a finding might have on a decision which turns on other issues. This matter is dealt with in part in Question 4 of the certified questions in *Benitez*.

[27] In my view, it would be unfair for the Applicant to lose whatever benefits may flow from the Federal Court of Appeal's decision on Guideline 7 by virtue of this Court failing to preserve any appeal rights. If Guideline 7 is unlawful in some respect, that ruling on cases which turn on other issues is of general importance.

[28] Therefore, I will certify the same seven questions as in *Benitez* along with the following additional question:

If Guideline 7 is unlawful, either in its creation or application, is a proceeding conducted under Guideline 7 and its decision lawful where the matter is determined on an issue unrelated to Guideline 7 or its application in that proceeding?

JUDGMENT

IT IS ORDERED THAT:

(a) This application for judicial review is dismissed.

(b) The following questions should be certified:

1. Does Guideline 7, issued under the authority of the Chairperson of the Immigration and Refugee Board, violate the principles of fundamental justice under s. 7 of the *Charter of Rights and Freedoms* by unduly interfering with claimants' right to be heard and right to counsel?

2. Does the implementation of paragraphs 19 and 23 of the Chairperson's Guideline 7 violate principles of natural justice?

3. Has the implementation of Guideline 7 led to fettering of Refugee Protection Division Members' discretion?

4. Does a finding that Guideline 7 fetters a Refugee Protection Division Member's discretion necessarily mean that the application for judicial review must be granted, without regard to whether or not the applicant was otherwise afforded procedural fairness in the particular case or whether there was an alternate basis for rejecting the claim?

5. Does the role of Refugee Protection Division Members in questioning refugee claimants, as contemplated by Guideline 7, give rise to a reasonable apprehension of bias?

6. Is Guideline 7 unlawful because it is *ultra vires* the guideline-making authority of the Chairperson under paragraph 159(1)(h) of the *Immigration and Refugee Protection Act*?

7. When must an applicant raise an objection to Guideline 7 in order to be able to raise it upon judicial review?

8. If Guideline 7 is unlawful, either in its creation or application, is a proceeding conducted under Guideline 7 and its decision lawful where the matter is determined on an issue unrelated to Guideline 7 or its application in that proceeding?

"Michael L. Phelan"

Judge