

Date: 20060614

Docket: IMM-5417-05

Citation: 2006 FC 749

Ottawa, Ontario, June 14, 2006

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

JIMMY SINOHE PIMENTEL COLMENARES

and KEYLA ELIZABETH ANTUNEZ GIL

Applicants

and

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants, Jimmy Sinohe Pimentel Colmenares and Keyla Elizabeth Antunez Gil, are husband and wife. Their claims for refugee protection and as persons in need of protection were rejected by the Immigration and Refugee Board (IRB) by a decision rendered at Calgary on August 18, 2005.

Background

[2] The Applicants came to Canada from Venezuela via the United States in 2004. Upon arrival, they related a history of political activity in opposition to the Chavez regime which triggered harassment, intimidation and physical attacks directed primarily at Mr. Pimentel.

[3] In testimony to the Board, Mr. Pimentel stated that he was an active member of the opposition party "Primero Justicia" and held a rank of "project co-ordinator of the participating budget" in Zulia state. A letter from Primero Justicia confirmed Mr. Pimentel's leadership role and, in a second letter, his political work was described as follows:

The following certify that the citizen Jimmy Sinohe Pimentel Colmenares, Venezuelan, holder of the Identity Card number 11.766.851 of profession Engineer, belongs to the Political Party the First Justice from the year 2000 to the present.

The citizen Jimmy Pimentel, work as Coordinator of Participative Budget and Control of State of Zulia, From the period September 2001 to the 15th of January of the 2004, when he had to leave the position and the country due the persecution by agents of the Government of President Chavez; which attacked his physical integrity in several occasions, also threatening of death by the fact to have an ideology and political values opposed to the present regime.

The work of the co-ordinator Jimmy Pimentel is recognized in the humblest sectors of the State of Zulia, in where he created communitarian work groups whose function consisted of guarding the civil and economic rights of the citizens include in the Venezuelan laws. Also he participated actively in the general activities of our party, as much in the State of Zulia as in other Organizations.

The facts of violence, persecution and murders by side of the Government of President Chavez, against the members of our party have been increased of alarming way in the last months. Including the totality of the National Territory and they same has including public figures as the Coordinator Jimmy Pimental even militants of smaller rank. (sic)

[English Translation]

Other documentary evidence submitted to the Board indicated that Mr. Pimentel was a frequent television commentator speaking on political issues at least between the dates of March, 2002 and November, 2003.

[4] Mr. Pimentel related two serious episodes of violence directed at him by Chavez supporters. The first involved a beating by five armed "Bolivarianos" in an effort to stop him from collecting signatures in support of a referendum to unseat the Chavez government. This assault was sufficiently serious that he fled the area to seek medical attention for injuries which immobilized him for seven (7) days. He said that this episode was followed by calls which threatened his life and that of his wife if he failed to withdraw from his political work.

[5] When Mr. Pimentel returned to his home town to file a formal complaint about the assault, he was told by the police that the matter would not be investigated. Two weeks later, he said that, while driving, he was fired upon; his call to the police with respect to that incident was again ignored. On the same day, he was called and told that his head would be hung from a tree. It was at this point that the Applicants fled from Venezuela.

The Board Decision

[6] It is apparent from the Board's decision that it accepted as truthful Mr. Pimentel's testimony about his political activity, and the episodes of intimidation and

violence which he had experienced. Certainly there is nothing in the decision which expresses any reservation about his credibility and the incidents he related are all duly noted.

[7] The Board appears to have rejected the Applicants' claims on the basis that they had an internal flight alternative (IFA) and that there was "no systematic violation of human rights against rank and file activists of opposition parties" in Venezuela. Mr. Pimentel's role with Primero Justicia is also described by the Board as a "low-level affiliation", which it held would not make him a target of Chavez supporters upon a return to Venezuela. With respect to the Applicants' recourse to an IFA, it was suggested by the Board that either Caracas or Valencia would offer a safe haven.

Issues

1. Did the Board commit a reviewable error in its treatment of evidence concerning Mr. Pimentel's political profile?
2. Did the Board commit a reviewable error in concluding that the Applicants had an IFA?

Analysis

[8] It was accepted that, with respect to the Board's factual and evidence-based determinations, the standard of review is one of patent unreasonableness: see *Offei v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 2000, 2005 FC 1619, especially paragraphs 10-15, and *Crespo v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 849, 2005 FC 672. In the latter case, which was factually similar to the case at bar, Justice Carolyn Layden-Stevenson found that the Board ignored a key document (despite an otherwise comprehensive survey of documentary evidence), and it mischaracterized the evidence presented, so that an IFA was found for the applicant where none existed. In the result, the Board's decision in that case was quashed.

[9] As in the above-noted cases, there are serious deficiencies with the Board's decision which require that this matter be remitted for reconsideration on the merits.

[10] It is obvious that the Board failed to correctly deal with the issue of Mr. Pimentel's political status or profile within the political opposition movement in Venezuela. While a much better job could have been done in drawing out this evidence before the Board, the Record nevertheless discloses that he was almost certainly not a "low-level" or "rank and file" affiliate of Primero Justicia. He had a much higher profile as a political activist than the Board attributed to him - at least within Zulia state - and his role was of sufficient concern to supporters of the Chavez regime that he was specifically targeted. This does not appear to be a case of a person simply being in the wrong place at the wrong time.

[11] The Board's decision makes no mention of the corroborating correspondence from Primero Justicia, or the evidence of his public profile as an

opposition television commentator. This was critical evidence which directly contradicted the Board's finding that Mr. Pimentel was a low-level party functionary. It was, therefore, evidence which the Board was obliged to consider and the failure to do so constitutes the kind of error which was of concern to the Court in the case of *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 where Justice John Evans held at paragraph 27:

27. Finally, I must consider whether the Refugee Division made this erroneous finding of fact "without regard for the material before it." In my view, the evidence was so important to the applicant's case that it can be inferred from the Refugee Division's failure to mention it in its reasons that the finding of fact was made without regard to it. This inference is made easier to draw because the Board's reasons dealt with other items of evidence indicating that a return would not be unduly harsh. The inclusion of the "boilerplate" assertion that the Board considered all the evidence before it is not sufficient to prevent this inference from being drawn, given the importance of the evidence to the applicant's claim.

[12] Here, the Board gave no explanation for how it came to the conclusion that Mr. Pimentel was a low-level or rank and file political operative. The only evidence that the Board had before it on this issue pointed away from that conclusion. Furthermore, the Board's theory of low-level political involvement was contradicted by the amount of attention that Mr. Pimentel received from Chavez supporters. In my view, the Board had an obligation to carefully consider the evidence describing Mr. Pimentel's political profile and status as a political opponent to the Chavez regime. The Board's failure to refer to that evidence indicates that it made an erroneous finding of fact without regard to the material before it.

[13] The Board's treatment of the IFA issue is also troublesome. When Mr. Pimentel was asked about the possibility of finding a safe haven outside of his home state, he testified:

Q. Now if you were to return to Venezuela could you relocate someplace in Venezuela? There are many cities that you could think of, that you would be safe from these people that you are afraid of?

MEMBER: Perhaps you should suggest a couple of locations, say Caracas or Valencia.

REVEREND MCLEOD: Thank you, sir, I'll select those two.

MEMBER: And in general terms just anywhere outside Zulia.

THE CLAIMANT: No, I cannot - the main reason why I was persecuted in the state of Zulia, and in Venezuela, was due to my opposition to the government. And since January of this year after the amendments that were done to the penal code I could not manifest any kind of opposition to the government nor could I join any political party because now within a legal framework the government will have the right to torture me, persecute me, or harm me. And for me to return where right now aside from one of the states, all of the states in Venezuela - well with the exception of one state, all of the

states in Venezuela are under control of the government. If I were to return I would have to renounce my implicit right which is entrenched in the national legislature - entrenched in the national legislation on the international letter of human rights where I have the right to exercise a political opinion, a political activity. If I were to renounce that right maybe I could be - I could have some kind of - I could enjoy some kind of safety, but my beliefs and my values, as well as my right, I will not renounce, I will not renounce my firm opposition that I have against the (indiscernible) government because I believe that it is a totalitarian system and it violates human rights.

[14] It is difficult to understand how Mr. Pimentel could be safe in any part of the country, given that his persecutors were supporters of the national government and that the police, who apparently ignored his complaints, were part of the apparatus of state protection- unless, of course, he was prepared to abandon his commitment to political change. But the law does not require a victim of politically motivated persecution to necessarily abandon his commitment to political activism in order to live safely in a country like Venezuela: see *Ahmed v. Secretary of State for the Home Department* [1999] E.W.J. No. 5882 (English C.A.). The Board's decision contains no analysis of Mr. Pimentel's evidence on this issue and it is devoid of any appreciation of the risk the Applicants could face if they returned to Venezuela and Mr. Pimentel resumed his political activity. This failure to deal with Mr. Pimentel's evidence that he would resume his political activities upon a return to Venezuela also constitutes a reviewable error with respect to the IFA question. Support for this can be found in the case of *Malik v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 297, 2002 FCT 223 where Justice John O'Keefe made the following observation at paragraph 28:

28. I am of the opinion that the Board made a reviewable error in its assessment of the IFA in Kotli. The transcript discloses that the applicant testified that he would have the same problems in the bigger town. If this is true, Kotli would not be an IFA for the applicant. The Board did not seem to address in its decision the fact that the applicant would have the same problems in the bigger town. The applicant's testimony would appear to be supported by the remarks from page 2 of the decision cited above. I therefore find that the Board made a reviewable error in relation to the IFA issue.

[15] For the reasons stated above, it is necessary that this matter be remitted to a different Board for reconsideration on the merits. Neither of the parties requested a certified question and no question of general importance arises.

JUDGMENT

THIS COURT ADJUDGES that the decision of the Board be set aside with this matter to be remitted to a different Board for re-determination on the merits.

Judge

FEDERAL COURT

Names of Counsel and Solicitors of Record

DOCKET: IMM-5417-05

STYLE OF CAUSE: JIMMY SINOHE PIMENTAL COLMENARES
ET AL

- and -

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: WEDNESDAY, JUNE 7, 2006

REASONS FOR JUDGMENT

AND JUDGMENT BY: BARNES J.

DATED: June 14, 2006

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