Federal Court  Cour fédérale

Date: 20111103

Docket: IMM-2645-11

Citation: 2011 FC 1262

Vancouver, British Columbia, November 3, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JOAQUIN ROBERTO MEZA DELGADO
ELSA MARINA BERNAL DE MEZA
ELSA ALEJANDRA ARTEAGA BERNAL

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] When all that is central to a case at its core is overlooked, a matter cannot be said to have been understood. The decision of the Supreme Court in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, recognizes, acknowledges and understands, in specific terms, the need for reasonableness to be manifested through the existence of justification, transparency and intelligibility.

[2] In this case, the evidence as analyzed by the first-instance decision-maker is void of meaning. The evidence is not set out for what it is, or is not. The appropriate legislative provision, or section of the legislation which requires, at the very least, consideration is wholly missing; therefore, the synthesis, or the sum of all parts, of the evidence as a whole, is suspended in limbo, lost in unintelligible space (without answers as to what was said and why). Without analytical retrieval, and, without the exercise of synthesis or the coming together of the narrative in all of its various parts, the sum of all parts never does come together; and, its reasoning bears no semblance of an adequate analysis of the evidence.

[3] Therefore, the entire case must be heard anew by a different first-instance decision-maker. This is to ensure that the evidence will be understood as a whole; only then can reasonableness, as defined by the *Dunsmuir* decision, see the light of day.

II. Introduction

[4] This is a judicial review of a Refugee Protection Division (RPD) of the Immigration and Refugee Board (Board) decision which determined that the Respondents are Convention refugees. The Applicant seeks to have the decision set aside in recognition of the Board Member having failed to consider whether the Respondents are excluded from refugee protection under Article 1F(*b*) of the Refugee Convention.

III. Judicial Procedure

[5] This is an application for judicial review of the RPD decision, dated March 14, 2011, determining that the Respondents are Convention refugees under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

IV. Background

[6] The Minister intervened in the Respondents' refugee protection claims on the basis that the principal applicant, Mr. Joaquin Meza Delgado, is described in Article 1F(*b*) of the Refugee Convention. In particular, allegations were made that serious reasons exist to consider that Mr. Meza Delgado engaged in the serious non-political crime of misappropriating $60,000 USD while working as the Consul General at the El Salvadoran consulate in Vancouver, Canada (Exclusion Issue). Under section 98 of the *IRPA*, the definition of a "Convention refugee" excludes persons who are described in Article 1F(*b*).

[7] The Minister's position is that the RPD decision be set aside because the Board Member erred in law and failed to exercise her jurisdiction by ignoring the Exclusion Issue. Moreover, a breach of natural justice is alleged as no reliable transcript is available of key testimony on which the Board Member had based the decision – that of the Respondents' witness, Salvador Nelson Garcia Cordova.

V. Analysis

[8] The Board Member erred in law in finding that Mr. Meza Delgado's wife and daughter, Elsa Bernal and Elsa Meza Delgado, have a nexus to the definition of a Convention refugee due to membership in a "particular social group".

[9] The Court does accept the reasoning of the Applicant:

- The IRB Board Member erred in law and failed to exercise her jurisdiction by failing to consider section 98 of the *IRPA*. As a result, she applied an incomplete version of the "Convention refugee" definition and erroneously ignored the extensive evidence and argument filed by the Minister of Public Safety and Emergency Preparedness. The evidence pointed to a need to consider that Mr. Meza Delgado be excluded from the "Convention refugee" definition for serious reasons which exist in regard to Article 1F(*b*) of the Refugee Convention due to the serious, non-political crime of defrauding the El Salvadoran government; key reference is made to Tab G of the Applicant's Record for consideration of an alleged misappropriation of funds, in a letter of June 4, 2008, signed by Mr. Ron Yamauchi, Hearing Officer, Pacific Region Enforcement Centre, Canada Border Agency.
- Moreover, there is a breach of procedural fairness because the transcript of the November 2010 hearing is significantly incomplete. The Board Member's decision turned largely on her detailed findings in regard to the nature of the El Salvadoran legal system and the status of Mr. Meza Delgado's continuing legal challenges in El Salvador. These findings were based on the testimony of Mr. Salvador Nelson Garcia Cordova, Mr. Meza Delgado's lawyer and close personal friend in El

> Salvador; however, the transcript of Mr. Cordova's testimony is missing key portions: almost all the evidence in respect of the findings on which the Board Member stated she had relied is, in fact, missing.

[10] Notwithstanding the errors, each of which is sufficient to warrant setting aside the Board Member's decision, the Certified Tribunal Record discloses that the Board Member also erred in law by misapplying "particular social group" under the Convention refugee definition.

[11] To the contrary, it is well-established that a family member of someone, who may be at risk, is not, in and of itself, sufficient to establish a nexus to the Convention refugee definition. Rather, the onus lies on a refugee claimant to establish personal risk, wherein a family as a whole may, or will be, targeted as a group (*Pour-Shariati v Canada (Minister of Employment and Immigration)* (1997), 215 NR 174 (FCA); *Mancia v Canada (Minister of Citizenship and Immigration)*, 2011 FC 949).

[12] This Court recently summarized this principle in *Mancia*. In that case, the applicant was a citizen of El Salvador who claimed that she was at risk of persecution on a Convention ground. That ground arose due to the allegation that her brother had been targeted by an El Salvadoran criminal gang, the Maras. The applicant asserted that she therefore was a member of a particular social group, namely, "a family member of the one who has been targeted by the Maras." The Court rejected this argument:

> [10] In addition to submitting that the Board failed to understand or assess her claim as gender-related, the Applicant also argues that the Board failed to appreciate that the claim also was made on the basis of her membership in a particular social group – namely, her

family. The Applicant points to the transcript of the hearing where counsel for the Applicant suggests that the nexus between the Applicant's claim and a Convention ground was "As a family member of the one who has been targeted by the Maras". The transcript also demonstrates that the Applicant repeatedly testified that she feared attacks from the gangs because of her relationship to her brother.

[11] Merely being a family member of someone who has been the victim of crime does not mean that there is a nexus to a Convention ground. As explained in *Rivaldo Escorcia v Canada (Citizenship and Immigration)*, 2007 FC 644, at paragraph 39,
Saying, however, that a claim is not extinguished does not relieve non-excluded family members from putting forward evidence that supports their claim. The jurisprudence of this Court has found that persecution against one family member does not automatically entitle all other family members to be considered refugees (see *Pour-Shariati v. Canada (The Minister of Employment and Immigration)* (1997), 215 N.R. 174 (F.C.A.), 39 Imm. L.R. (2d) 103; *Marinova v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.T. 178, 103 A.C.W.S. (3d) 1198). In *Granada v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1766, 136 A.C.W.S. (3d) 123, [2004] F.C.J. No. 2164 (F.C.) (QL), a similar case of a family claiming their refugee status dependent upon a family member's fear of persecution against the FARC, the Court stated at para. 16:

> The family can only be considered to be a social group in cases where there is evidence that the persecution is taking place against the family members as a social group: *Al-Busaidy v. Canada (Minister of Employment and Immigration)* (1992), 139 N.R. 208 (F.C.A.); *Casetellanos v. Canada (Solicitor General)*, [1995] 2 F.C. 190 (F.C.T.D.); *Addullahi v. Canada (Minister of Citizenship and Immigration)* (1996), 122 F.T.R. 150; *Lakatos v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 408, [2001] F.C.J. No. 657 (F.C.T.D.) (QL). However, membership in the social group formed by the family is not without limits, it requires some proof that the family in question is itself, as a group, the subject of reprisals and vengeance or, in other words, that the applicants are targeted and marked simply because they are members of the family even though they themselves have never been involved in politics and never will be so involved. (*Canada (Minister of Citizenship and Immigration) v.*

> *Bakhshi*, [1994] F.C.J. No. 977 (FCA) (QL)).
> [Emphasis in original].

[13] In the present case, the reasons of the Member contain the very same error made by Ms. Mancia. Having determined, based on Mr. Cordova's testimony, that Mr. Meza Delgado is at risk of persecution on the Convention ground of "political opinion", the Member concludes that, therefore, because they are his immediate family members, Mr. Meza Delgado's wife and daughter necessarily are "members of a particular social group":

> [40] I find that the principal claimant faces a reasonable possibility of persecution by reasons of his political opinion, and that the associated claimants by reasons of their membership in a particular social group, i.e., being immediate family members of the principal claimant.

[14] Insofar as the Board Member comments in paragraph 39 of her Reasons, that "the claimants will likely face politically motivated charges that could include significant incarceration for all claimants", it is unclear what the basis is for her reference to "all claimants." There does not appear to be any evidence in the Certified Tribunal Record that Mr. Meza Delgado's wife and daughter are being investigated, or are of interest to the El Salvadoran authorities. Nor does the Member identify any general documentary evidence of reprisals against the family members of Government officials, who were investigated by the Court of Accounts in connection with corruption or fraud. The Board Member does suggest that she may be relying on the oral testimony of Mr. Cordova – Mr. Meza Delgado's close personal friend and lawyer; however, as explained by the Applicant, no meaningful transcript exists of this evidence; therefore, what Mr. Cordova actually said is unknown. In any event, the limited excerpts of Mr. Cordova's testimony that are available suggest that Mr. Cordova's

other clients are not in the same circumstances as Mr. Meza Delgado; they are rather the subject of extradition proceedings (decision at para 39).

[15] The Board Member's reference to "all claimants" in paragraph 39 is confusing as the Member draws from a statement in paragraph 36 whereupon she relies on Mr. Cordova's evidence to find "the claimant" to be at risk; she then concludes in paragraph 39 (following unrelated citations in paragraphs 37 and 38) that "all claimants" are at risk, without having conducted any analysis or explanation as to how she derived from the one "claimant" at risk, that all the claimants became at risk. In the circumstances, the Board Member's reasons fall short of the threshold of "justification, transparency and intelligibility" as directed by the Supreme Court (decision at para 36-40; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59).

VI. Conclusion

[16] In sum, the Board Member's conclusion that Mr. Meza Delgado's wife and daughter meet the definition of "Convention refugee" under the *IRPA* is based on material errors of fact and law, with reasons that are insufficient. Therefore, the Board Member's decision in that regard is set aside as is the decision in regard to Mr. Meza Delgado.

[17] Accordingly, for all of the above reasons, the Board Member's decision is entirely set aside and remitted to a different decision-maker for determination anew.

JUDGMENT

IT IS THIS COURT'S JUDGMENT that the Board Member's decision be set aside and remitted to a different decision-maker for determination anew. No question of general importance for certification.

OBITER

The quandary appears to turn on whether the allegations were improper, or proper, in regard to Mr. Meza Delgado. Was someone or some entity attempting to "frame" him in a Kafkaesque manner? It is difficult, if not impossible, in fact, to make out what happened at the refugee hearing and why the Refugee Board decided what it did. From materials submitted to the Federal Court, it is recognized that Mr. Meza Delgado held key political positions in El Salvador, including that of head of the Christian Democratic Party and had also been a former ambassador of El Salvador to the United Nations.

In recognizing the allegations against Mr. Meza Delgado, a key question remains without answer: whether the rent for the consulate premises in Vancouver, evidence which would be derived in Canada (for the time in question) was paid; and, what was the sum total dollar figure for the rental property. That would, at least, ascertain the validity of the key allegation against him in respect of most of the misappropriation of funds. In addition, the IRB is missing a key portion of its transcript on the Exclusion Issue itself which contributes to an even more Kafkaesque situation wherein the most significant evidence on that issue is unavailable; thus, the allegations cannot be ascertained with any meaning as to whether they are substantial or otherwise. One way or another,

the only entity that can resolve the issues left in a quandary is the IRB, Refugee Determination Division, as it is the decision-maker of first instance, the decision-maker as to the facts at issue; when the facts at issue are sorted out, only then can inherent logic be applied to the evidence by which to reach a conclusion (which logic and evidence are presently wholly missing).

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Banafsheh Sokhansanj	FOR THE APPLICANT
Craig Costantino	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada Vancouver, BC	FOR THE APPLICANT
Craig Costantino Barrister & Solicitor Vancouver, BC	FOR THE RESPONDENTS