

Date: 20080204

Docket: IMM-848-07

Citation: 2008 FC 150

Toronto, Ontario, February 4, 2008

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**EMANUEL CORREIA DE VASCONCELOS MELO
and FABIO WILSON DE MELO CARNEIRO**

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicants, both citizens of Brazil, seek refugee protection based on detailed stories of growing up in Brazil as homosexual males, and the threats, violence and mistreatment that they received as a result. Their personal information forms (PIFS) and the evidence they provided at their hearing before the Refugee Protection Division of the Immigration and Refugee Protection Board (RPD), details incidents of physical attacks, harassment, discrimination and bias. One major incident of violence took place at the hand of the Applicant Melo's father, who is police commissioner.

[2] After coming to Canada on student visas, the Applicants remained after their visas lapsed. They testified that they were frightened of being deported but they were unaware that they were eligible to make refugee claims. After they found out that people in their position had made successful claims, they submitted claims for protection.

[3] The RPD's decision rejecting the Applicants' claim (the Decision) was issued on January 31, 2007, after a brief hearing. The RPD did not make a negative credibility finding with respect to the Applicants, and, therefore, it is presumed to have accepted all of their evidence. The primary reason given by the RPD for rejecting their claim is that it found that there is state protection prospectively available for the claimants in Brazil. In addition, the RPD held that the Applicants lacked subjective fear because of their delay in making their claim. The Applicants argue that both of these findings were made in error.

[4] The standard of review applicable to RPD findings of whether an applicant has rebutted the presumption of state protection has been established to be reasonable *simpliciter*: a pragmatic and functional analysis was undertaken by Justice Tremblay-Lamer in *Chaves v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, [2005] F.C.J. No 232, and her finding has been confirmed in several decisions (see eg. *Diaz De Leon v. Canada (Citizenship and Immigration)* 2007 FC 1307 at para. 21). The RPD's factual findings regarding subjective fear are reviewable on the standard of patent unreasonableness (*De (Da) Li Chen v. M.C.I.*, 49 *Imm. L.R.* (2d) 16).

[5] On the issue of state protection, the RPD's key finding is as follows:

The panel is also cognizant of the fact that the father of one of the claimants is a police officer. However, the claims are now 22 and 31 years old respectively. The panel finds the documents on sexual orientation issues above illustrate that while the system is flawed, and more needs to be done socially and institutionally to ensure that the initiative materialize, there is a serious and concerted effort being made by the government to address these issues, and claimants are required to approach these avenues before seeking international protection.

In view of the above, the panel is not convinced within a preponderance of probabilities, as it must be, that Brazil would not be reasonably forthcoming with serious efforts to protect the claimant, if they were to return to Brazil and seek protection. As stated in Ward, the claimant is required to adduce clear and convincing evidence to rebut the presumption that the state had the ability to protect him. The panel finds the presumption of state protection in this case has not been rebutted.

[Emphasis added]

(RPD Decision, p.7)

[6] In reaching this finding, I find that the RPD erred in several ways: it only addressed the legal position of homosexuals in Brazil rather than their real life situation; it selectively relied on documentary evidence without addressing evidence that contradicts its conclusions; and, even though no negative credibility finding was made, it dismissed the Applicants' experiences of persecution and their explanation as to why it was unreasonable for them to approach the authorities for protection.

[7] In the Decision, the RPD focuses on the legal position of homosexuals and the positive legislative changes that are being made in Brazil to combat violence against them. For example, it notes that some judges have recognized gay marriages, that there have been convictions of people

who have attacked gays, and that, by a court decision, surviving partners of a gay relationship are able to gain their partner's pension benefits. However, the question that the RPD fails to address is whether the legislative changes have in fact resulted in any meaningful protection for homosexuals in Brazil. This is an error; regardless of what positive legislative advancements are being made, it is the operational level that must be considered (*see eg. Neto v. Canada (Minister of Citizenship and Immigration)* 2007 FC 664; [2007] F.C.J. No. 893 (QL) para. 9.

[8] While approving all the legislative initiatives that are taking place in Brazil, the RPD failed to address striking contradictory evidence that demonstrates that state protection in Brazil is inadequate. Quoting from the Immigration and Refugee Board's own information sources on country conditions, the Decision reads:

Research directed by the Grupo Gay da Bahia (Gay Group of Bahia, GGB), based on newspaper reports (Grupo Dignidade 29 Nov. 2005), established that the number of murders of homosexuals in Brazil increased 27 per cent in 2004 compared to 2003 (GGB 28 Nov. 2005; O Globo 19 May 2005). According to GGB's study, there were 158 registered deaths in 2004 versus 125 in 2003 (*ibid.*). In correspondence with the Research Directorate, a representative of the Grupo Dignidade (Group Dignity) noted that "[t]here are no official statistics as to hate crimes against people due to their sexual orientation ... since not all the country's newspapers are monitored and only those reports that specifically mention the victim's sexual orientation are included" (29 Nov. 2005).

[Emphasis added]

(RPD Decision, p.4)

In addition, the RPD failed to mention numerous media articles and other reports presented by the Applicants as evidence that the situation for homosexuals in Brazil is precarious. Although the RPD is presumed to have assessed all the information presented to it, it is an error for the RPD to selectively rely upon evidence and fail to mention evidence that directly contradicts the conclusions that it reached (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No.1425 (QL) at para 15; *Cejudo Lopez v. Canada (Citizenship and Immigration)* 2007 FC 1341 at para. 24 (*Lopez*)).

[9] Another error made by the RPD is that it did not address the persecution recounted in the PIFS and the testimony of the Applicants. As the RPD accepted the Applicants' evidence as truthful, when addressing the state protection issue, the RPD was bound to take into account their experiences. The Applicants' evidence is directly contradictory to the RPD finding that they should have approached the authorities for protection and that, if they had, protection would have been forthcoming. As was recently confirmed by the Federal Court of Appeal, in *Hinzman v. Canada (Minister of Citizenship and Immigration)* 2007 FCA 171, [2007] F.C.J. No. 584 (QL) at para. 46, the burden on an applicant to rebut the presumption of state protection is heavier in situations where an applicant comes from a country that is a democracy and in which the government functions under a series of checks and balances. Therefore, in these situations a claimant must show that he or she undertook more than usual effort to seek out the avenues of protection available. However, if an applicant is able to demonstrate with reliable evidence that, in his or her particular situation, state protection does not exist, or that it would have been unreasonable to approach these avenues, this

will be enough to rebut the presumption (*Carrillo v. Canada (Citizenship and Immigration)* 2007 FC 320 at para. 15).

[10] The Applicant argues that the RPD erred in law when it stated that the claimants were required to approach internal avenues of protection before seeking international protection. I agree that the RPD misstated the law in this respect. The jurisprudence is clear that a claimant is not required to seek protection in his or her home state in all circumstances. Rather, the circumstances of each case must be considered contextually to determine whether it would have been reasonable to do so. If a claimant can demonstrate that it would be objectively unreasonable to seek protection in the circumstances, a failure to do so is not determinative on the state protection issue (*Lopez, supra* at para. 24-26; *Diaz De Leon v. Canada (Citizenship and Immigration)* 2007 FC 1307 at para. 33); *De Araujo Garcia v. Canada (Citizenship and Immigration)* 2007 FC 79 at para. 29.

[11] In the present case, the Applicants did not seek out state protection before they left Brazil, however they provided reliable evidence to explain why this was a reasonable course of action. The Applicants presented documentary evidence stating that the police are corrupt in Brazil and are known to target homosexuals. The Applicant Melo also explained the reason why they did not go to the police after his father, a police commissioner, beat up the Applicant Carneiro:

In Brazil, things work the following way. Had I gone to the Police and told them that my father beat me up because I was gay, they would say 'Great, he didn't do anything wrong' or, in case they had written a report to register that, I'm sure that nothing would have happened. I'm sure about that...I know about incidents that happened to gay people and well the police were the perpetrators.

(Tribunal Record, pp. 262-263)

[12] In addition, the Applicants tendered a psychologists report for the Applicant Melo attesting to the psychological problems that he experiences as the result of his harsh treatment in Brazil. The RPD held that this document has no relevance on the state protection issue:

The panel understands the emotional impact of rejection by one's family. However, psychologists' opinions have no relevance with respect to the issue of state protection and the issue of whether the fear is objectively well founded.

(RPD Decision, p.7)

I agree with the Applicants that this statement is incorrect. In reaching a contextual assessment of whether it is reasonable for an applicant to have sought state protection, evidence with respect to an applicant's mental state can be very relevant. In failing to address the Applicants' explanations for not seeking out state protection, including evidence of their psychological condition, I find that the RPD erred.

[13] As I have found that the RPD erred in several ways in undertaking the state protection analysis, I find that the RPD's state protection determination is unreasonable.

[14] Although the finding regarding state protection formed the core of the Decision, the RPD made an ancillary finding on subjective fear which has the effect of defeating the Applicants' claim:

The panel finds that the delay in making a claim and living here illegally for about 26 months, thereby risking deportation to the very country where they allegedly fled from, belies a well-founded fear for persecution or need for protection, and indicates an absence of subjective fear.

(RPD Decision, p. 2)

I find that the RPD's conclusion that there was no subjective fear on the part of the Applicants is nothing more than an unsubstantiated assertion and, therefore, is patently unreasonable.

[15] The Applicants provided significant evidence as to why there was a delay of approximately two years between the time that they arrived in Canada and the time they submitted their refugee claim. Indeed, the RPD notes their explanation in its reasons, namely, that they did not go to immigration because they did not know anything about making refugee claims; were scared of being deported; and, once they found out they were eligible, they submitted their claim.

[16] Without being rebutted by a negative credibility finding, it is presumed that the Applicants' evidence is true (*Maldonado v. M.E.I.*, [1980] 2 F.C 302 (C.A.)). If the RPD did have credibility concerns, then, as a result of the presumption of truthfulness, the RPD was required to state its reasons for doubting the Applicants' testimony in clear and unmistakable terms (*Valtchev v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1131 at paras. 6- 8).

[17] The RPD did not make a negative credibility finding; therefore, its conclusion that the Applicants lacked subjective fear has no foundation in the evidence.

[18] As the RPD's findings on state protection and subjective fear fail, I find the Decision is rendered in reviewable error.

ORDER

Accordingly, I set aside the RPD's decision and refer the matter back to a differently constituted panel for re-determination.

“Douglas R. Campbell”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-848-07

STYLE OF CAUSE: EMANUEL CORREIA DE VASCONCELOS MELO
and FABIO WILSON DE MELO CARNEIRO v. THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 24, 2008

**REASONS FOR ORDER
AND ORDER BY:** CAMPBELL J.

DATED: FEBRUARY 4, 2008

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