Date: 20070308

Docket: A-310-06

Citation: 2007 FCA 99

CORAM: **RICHARD C.J.**

SHARLOW J.A.

MALONE J.A.

BETWEEN:

LUIS MIGUEL TRUJILLO SANCHEZ

DEYSSE JHANET VELANDIA BARON

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on February 27, 2007.

Judgment delivered at Ottawa, Ontario, on March 8, 2007.

REASONS FOR JUDGMENT BY:
RICHARD C.J.

CONCURRED IN BY:
SHARLOW J.A.

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REASONS FOR JUDGMENT

RICHARD C.J.

[1] This is an appeal from the decision of Justice Barnes of the Federal Court (2006 FC 604) dismissing the appellants' application for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division, ("Board") whereby their claims for refugee protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act* S.C. 2001, c. 27 (the "Act") were denied.

[2] I have not been persuaded that there is any basis for interfering with the applications judge's decision. My reasons for so concluding are the following.

Facts

[3] The appellants, a husband and wife, are Colombian nationals. The appellant, Mr. Sanchez, was employed on a full-time basis by the Colombian Ministry of Agriculture as an engineer, with a specialty in environmental clean-up. In addition, Mr. Sanchez and his brother ran a side-line business that reported violations of signage by-laws to the Bogot city authorities. Upon successful prosecution of the offender, he and his brother received a percentage of the fine that was levied against the guilty person or business.

[4] Mr. Sanchez was threatened by the Fuerzas Armadas Revolucionarias de Colombia ("FARC") due to his part-time business. He first received a threatening letter in June 2002 in which FARC demanded that he and his brother desist from reporting violators of municipal sign by-laws. The letter intimated that their part-time business was adversely affecting the ability of businesses in the city to pay extortion money to FARC. The letter ended by warning Mr. Sanchez that he was being watched.

[5] Mr. Sanchez did not comply with FARC's demands and continued to operate his business. Two years later, in 2004, Mr. Sanchez was abducted by FARC on two occasions. Mr. Sanchez testified that FARC threatened him at gun point and told him to cease reporting violators of the city's sign by-laws to the authorities. It was after the second abduction that the appellants came to Canada to claim refugee protection.

Decision of the Immigration and Refugee Board

[6] The Board found that the appellants were neither Convention refugees nor persons in need of protection. Although the Board found the testimony of Mr. Sanchez credible, it did not consider the facts to give rise to a successful claim. The Board found no indication that the lives or the well-being of the appellants would have been at risk had Mr. Sanchez simply chosen to comply with the warning and cease his side business. The Board was of the view that, given FARC's threatening conduct, it was not unreasonable to expect Mr. Sanchez to cease his side business and that his inability to continue this endeavour was not a denial of his core human rights or of his general ability to earn a living.

Decision of Federal Court on judicial review

[7] The applications judge found the Board's decision to be reasonable and legally correct. He dismissed the application for judicial review and certified this question:

> Before seeking protection from another state, is a person obliged to make lifestyle or other employment changes which would offer protection from persecution or which

> could protect the life and safety of a claimant and, if so, what is the test for making such a determination?

Standard of review

[8] This Court is required to determine the correct standard of review and determine whether the applications judge correctly applied that standard of review: see *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, at paragraph 14, citing *Zenner v. Prince Edward Island College of Optometrists*, 2005 SCC 77 at paragraphs 29-45 *per* Major J. and *Alberta (Minister of Municipal Affairs) v. Telus Communications Inc.* (2002), 218 D.L.R. (4th) 61 at paragraphs 25-26 *per* Berger J.A.

[9] The determination of the correct legal test under sections 96 and 97(1) of the Act involves a question of law reviewable on the standard of correctness, and the question as to whether the facts found by the Board satisfy the legal test is a question of mixed fact and law within the expertise of the Board and is reviewable on the standard of reasonableness. There was no challenge to any of the Board's findings of fact.

[10] Fundamentally, the applications judge was required to determine, based on the facts as found by the Board, whether the appellants would be at risk of harm upon a return to Colombia to an extent that they could be found to be Convention refugees or persons in need of protection. The applications judge considered these to be questions of mixed fact and law subject to review on the standard of reasonableness. In so doing, he referred to the decision of Gibson J. in *Jayesekara v. Canada (Minister of Citizenship and Immigration)*, (2001) 211 F.T.R. 100 (T.D.), 2001 FCT 1014. The applications judge then went on to state the following at paragraph 11:

> At the end of the day, the application of the appropriate standard of review is of no significance to my analysis because, whatever the standard may be, I believe that the Board's decision was both reasonable and legally correct.

Analysis

[11] The applications judge found no evidentiary foundation to support the appellants' claims for convention refugees under section 96 of the Act. The record disclosed that FARC was engaged in a form of criminal extortion which, insofar as the appellants were concerned, had no obvious political aspect to it. The applications judge also rejected the appellants' argument that FARC's actions were connected to Mr. Sanchez's political family history, noting that there was no material evidence to indicate that FARC's intentions went beyond Mr. Sanchez's part-time employment.

[12] The appellants submit that the applications judge erred in his assessment of Mr. Sanchez's activities and FARC's perception of these activities. They argue that the test is not whether Mr. Sanchez is engaged in political activities but, rather, whether FARC perceived Mr. Sanchez to be part of a particular social group or a

businessman or holds a certain political opinion. In support of this submission, the appellants rely on Mr. Sanchez's testimony regarding incidences involving his family at the hands of FARC, including his evidence that his father had been the Governor of the Department of Caqueta and that the family home had been attacked by FARC. The appellants also rely on a denunciation to the Judicial Police, a letter from FARC, a denunciation to the Fiscalia, a denunciation to the "Anti-Kidnapping and Extortion Bureau" and the RPD Index for Colombia.

[13] In reaching his conclusion, the applications judge carefully assessed all of the evidence alluded to by the appellants and properly considered the perspective of FARC and concluded that the evidence was simply not sufficient to support a claim for convention refugee status on the ground of membership in a particular social group or political opinion. Mr. Sanchez did not himself have the stature to attract political attention and none of the evidence specified by the appellants suggests that Mr. Sanchez was being targeted for political reasons. Neither the July 2002 nor the February 2004 denunciations suggest that Mr. Sanchez or his brother believed their family's political history had any bearing on the threats from FARC. To the contrary, the evidence indicates that FARC had a limited interest in Mr. Sanchez, which was for him and his brother to abandon their business.

[14] In dismissing the application for judicial review, the applications judge also concluded that the appellants are not persons in need of protection under subsection 97(1) of the Act. The main issue on this appeal is whether the applications judge applied the correct legal test in assessing whether the appellants would be at a risk of harm if removed to Colombia. As this Court noted in *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 239 (C.A.), 2005 FCA 1, subsection 97(1) does not incorporate a subjective component. As *per* Rothstein J.A., at paragraph 33:

> It is true that a refugee hearing a panel may be asked to consider both whether an individual is a Convention refugee and whether that individual is in need of protection. Some of the evidence may apply to both determinations. However, there are differences between section 96 and paragraph 97(1)(a). For example, a claim for protection under paragraph 97(1)(a) is not predicted on the individual demonstrating that he or she is in danger of torture for any of the enumerated grounds of section 96. Further, there are both subjective and objective components necessary to satisfy the requirements of section 96: see Chan v. Canada (Minister of Employment and Immigration), [1995] 3 S.C.R. 593 at paragraph 120 per Major J., while a claim under paragraph 97(1)(a) has no subjective component. Because of such differences, it cannot be said that the provisions are so closely related that it would irrational if the test under paragraph 97(1)(a) was not identical to the test under section 96.

[15] As such, a determination of whether a claimant is in need of protection requires an objective assessment of risk, rather than a subjective evaluation of the claimant's concerns. Evidence of past persecution may be a relevant factor in assessing whether or not a claimant would be a risk of harm if returned to his or her country, but it is not determinative of the matter. Subsection 97(1) is an objective test to be administered in the context of a *present* or *prospective* risk for the claimant.

[16] In assessing the existence of a prospective risk, the applications judge analogized the appellants' situation to one where there is an internal flight alternative (IFA) and held that "Canada cannot and should not be a substitute refuge for those who have the option of choosing a safe haven in their home countries" (paragraph 18). Without importing the IFA test into subsection 97(1), I believe the underlying purpose of the IFA test is helpful in assessing a risk of harm. As noted by this Court in *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (C.A.), at paragraph 12, "if there is a safe haven for claimants in their own country, where they would be free of persecution, they are expected to avail themselves of it unless they can show that it is objectively unreasonable for them to do so." Similarly, claimants who are able to make reasonable choices and thereby free themselves of a risk of harm must be expected to pursue those options.

[17] In this case, the evidence indicates that Mr. Sanchez was being targeted by FARC because they wanted him to cease reporting violators of the city's by-laws to the authorities. Both the Board and the applications judge found that Mr. Sanchez had an alternative that would eliminate future risk of harm to the appellants, that is, he could choose to cease operating his side business. This alternative is objectively reasonable because Mr. Sanchez has the ability to earn a living as an engineer. He had been employed as an environment engineer and could be employed in that capacity again upon a return to Colombia. In these circumstances, Mr. Sanchez must be expected to abandon his side business as demanded by FARC in order to eliminate the risks he faces.

[18] The appellants submit that the applications judge erred in finding that denial of an employment interest of this sort does not engage a principal of fundamental human rights or dignity. They argue that these were engaged when FARC effectively prevented Mr. Sanchez from pursuing a "freely chosen" profession. However, Mr. Sanchez's freedom to practice and profess his religion, give expression to an immutable personal characteristic, express his political views, etc., was not affected by abandoning his side business. Moreover, Mr. Sanchez was not deprived of his general ability to earn a living. He continued to be employed as an engineer by the Ministry of Agriculture throughout the relevant period.

[19] As noted by the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at pages 738-739:

> […] Canada's obligation to offer a haven to those fleeing their homelands is not unlimited. Foreign governments should be accorded leeway in their definition of what constitutes anti-social behaviour of their nationals. Canada should not overstep its role in the international sphere by having its responsibility

> engaged whenever any group is targeted. Surely there are some groups, the affiliation in which is not so important to the individual that it would be more appropriate to have the person dissociate him- or herself from it before Canada's responsibility should be engaged. Perhaps the most simplified way to draw the distinction is by opposing what one is against what one does, at a particular time. For example, one could consider the facts in Matter of Acosta, in which the claimant was targeted because he was a member of a taxi driver cooperative. Assuming no issues of political opinion or the right to earn some basic living are involved, the claimant was targeted for what he was doing and not for what he was in an immutable or fundamental way [emphasis added].

In this case, Mr. Sanchez was being targeted by FARC for what he was doing, i.e. reporting violators of the city's by-laws to the authorities, "not for what he was in an immutable or fundamental way." Denial of his side business interest would therefore not affect a fundamental principal of human rights.

[20] For these reasons, I am satisfied that in this case the applications judge was correct in his determination and his application of the appropriate standard of review. I am unable to discern any error in his decision that warrants the intervention of this Court. I would dismiss the appeal. I would answer the certified question as follows:

> It is not possible in the context of this case to attempt to develop an exhaustive list of the factors that should be taken into account in assessing whether a person is in need of protection. However, persons claiming to be in need of protection solely because of the nature of the occupation or business in which they are engaged in their own country generally will not be found to be in need of protection unless they can establish that there is no alternative occupation or business reasonably open to them in their own country that would eliminate the risk of harm.

"J. Richard"

Chief Justice

"I agree.

K. Sharlow J.A."

"I agree.

B. Malone J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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