ate: 20021230

Docket: IMM-399-02

Neutral citation: 2002 FCT 1329

BETWEEN:

HERNAN DARIO YOLI

Applicant

AND:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

ROULEAU, J.

[1] This application is for judicial review under subsection 82.1(2) of the *Immigration Act*, R.S.C. 1985, c. I-2 ("the Act") and concerns a decision of the Immigration and Refugee Board, Convention Refugee Determination Division ("the CRDD"), dated January 15, 2002, wherein it found the Applicant not to be a Convention refugee.

[2] The Applicant seeks an order quashing that decision and remitting the application to a differently constituted tribunal.

[3] The Applicant is a 28 year-old citizen of Argentina and was a member of the Boca Juniors soccer fan club ("Boca") in Buenos Aires since 1992. While associated with the sport of soccer, Boca is essentially one of the Barra Brava gangs of individuals engaging in criminal activities ranging from mere hooliganism to drug dealing and extortion.

[4] The Applicant began to associate with the leaders of Boca and became aware after two or three months that they were involved in drug dealing, murder and other criminal activities. A year after he joined the club, he was asked to become involved in moving weapons and selling drugs, but always refused to do so. He never was interested in sharing profits from any illegal activities.

[5] On April 30, 1994, the Applicant personally witnessed the shooting and killing by members of his club of two members of the rival "River" soccer fan club. One person the Applicant knew admitted that he had shot two people and warned the Applicant to keep his mouth shut.

[6] As a result of witnessing the shootings, the Applicant wished to disassociate himself completely from the club and did so. He then became fearful for his life because unidentified members of Boca were watching him, constantly warning and threatening him over the phone and demanding that he leave the country or else he and his family would be at risk.

[7] In June 1994, the Applicant left Argentina for the United States where he remained for a year with an acquaintance of his uncle. When his visitor's visa expired, he returned to Argentina. A week after his arrival, he started receiving threatening phone calls again. This caused him to move to Cordoba (another province of Argentina) in 1995 where he stayed for almost one year with his aunt. During this period, he alleges he was not bothered by Boca.

[8] In April 1996, when the business in which he worked closed and his aunt left for Buenos Aires, the Applicant returned as well. The threats resumed shortly after his arrival. After being told my members of Boca that they would put him in a coffin if he spoke to the police about what had happened in April 1994, the Applicant went into hiding in an empty store in Buenos Aires. There were no phone lines at this store and the Applicant stated that he felt relatively safe. During this period, his family, which had previously moved to Mar del Tuyo because they felt threatened, also returned to Buenos Aires in order to earn a living.

[9] In 1998, the Applicant began working in Buenos Aires as a salesperson for Daria Paints. In mid year, he began receiving phone threats at work. In August 1999, he received an envelope containing a bullet. Fearing for his life, he left Argentina on September 1999 and made a refugee claim upon his arrival in Canada on the basis of his perceived political opinion. He alleges that since his departure for Canada, his family has not received any further threatening calls or experienced any further difficulty.

[10] The Applicant was the subject of two refugee hearings, on November 9, 2000 and on September 20, 2001. The CRDD panel accepted the testimony of the Applicant as credible and trustworthy. After summarizing the evidence, the CRDD indicated the following in its reasons:

The claimant fears persecution from Boca. While purporting to be a mere sports fan club and purporting to be involved in political "rent-a-mob"activities, the panel finds that Boca is nothing but a criminal gang. The panel finds that the fear of criminal gangs, arising from having witnessed a crime, does not have a nexus to any of the grounds given in the Convention definition.

[11] The CRDD panel relied on the decisions in *De Arce v. Canada (Minister of Citizenship and Immigration)* (1995), 32 Imm. L.R. (2d) 74 (F.C.T.D.) and *Garcia v. Canada (Minister of Citizenship and Immigration)* (1999), 163 F.T.R. 144 (F.C.T.D.) in support of its conclusion. The panel then went on to deal with the decision in *Klinko v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 327 (F.C.A.) cited by counsel for the Applicant. It distinguished that case from the Applicant's in the following terms:

The panel distinguishes this case from Klinko because there is no persuasive evidence that the claimant's opposition to Boca club's criminal activities is a "matter in which the machinery of the state, government and policy may be engaged". While Boca may have been used by some political parties as part of a "rent-a-mob"strategy, there is no evidence that Boca and the state are so intertwined such that a failure to cooperate with Boca implies opposition to the state apparatus.

[12] Relying further on the decision in *De La Torre v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 735 (QL) (F.C.T.D.), the panel went on to note that the Applicant made no denunciation of Boca. Based on this, the panel distinguished the *Klinko* decision and found that there was no nexus between the Applicant's fears and any of the grounds enumerated in the Convention refugee definition.

[13] Finally, the panel went on to determine that Article 1F(b) of the Convention did not apply to exclude the Applicant from the Convention's definition.

[14] The Applicant now impugns the CRDD's decision with respect to its conclusion on the issue of nexus.

[15] The sole issue in this application is whether the CRDD panel erred in holding that there was no nexus between the Applicant's fears and any of the enumerated grounds in the Convention refugee definition.

[16] The Applicant contends that the undisputed facts of his case are essentially the following:

(a) He joined a group called "Barra Brava" supporters of the Boca soccer club;

(b) He subsequently became aware that members of the group were engaged in illegal activity including drug trafficking and murder;

(c) He witnessed a murder of two people carried out by members of the group, was able to identify the perpetrators and was aware of the fact that high ranking politicians and members of the police force were implicated in the illegal activities of the club;

(d) He was approached to engage in illegal activity but refused to do so and eventually left the group;

(e) As a result of his refusal to become involved in crime and due to a concern that he might reveal information concerning the identity of the perpetrators and their activities, he was subject to death threats and forced to flee the country.

[17] It is submitted that in light of this, the CRDD panel erred in finding that the applicant had not made out a refugee claim based on perceived political opinion. The CRDD panel erred in law in failing to properly apply to the facts of the applicant's case the principles developed by *Klinko, supra*, and the post-*Klinko* jurisprudence related to the concept of "perceived political opinion".

[18] First, it is argued that the political opinion need not be expressed; if an applicant engaged in acts that cause the persecutors to pursue him because they attribute a political opinion to him, this should be sufficient. In the case at bar, the members of Boca attributed a political opinion to the applicant. He refused to participate in their illegal activity, and they perceived him to be a traitor since they believed that he intended to reveal their illegal activities to the authorities.

[19] Second, the persecutors need not be the state but can be third parties who are persecuting the applicant due to the imputed political opinion. Significantly, there was evidence of a connection between the group and the state authorities due to the association between the group and high ranking and corrupt members of the police and authorities from which protection was unavailable. In the case at bar, there is no doubt that the "machinery of the state" was engaged.

[20] It is argued that state involvement in the present case is far more direct than it was in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 since members of the state apparatus were directly involved with the persecuting group and the

threats against the applicant were designed precisely to prevent him from revealing this involvement. Consequently, it is argued that the threats were directed against the applicant due to his perceived political opinion and not for any other reason.

[21] The CRDD panel relied on the decisions in *De Arce, supra* and *Garcia, supra*, in support of its conclusion that the applicant's fear of a criminal gang, arising from having witnessed a crime, did not have a nexus to the ground of perceived political opinion. It is submitted that these cases are distinguishable. The applicants were outsider witnesses to criminal acts. It was clear that there was no nexus. In this case however, the applicant was himself a member of the persecuting group. He refused to get involved in illegal acts and was put at risk because of his refusal and the perception by the other members of the group that he posed a risk to them. These facts were not present in either of the decisions relied upon by the CRDD.

[22] Further, the Applicant contends that the reasoning of the CRDD panel in distinguishing the applicant's case from *Klinko* reveals several errors.

[23] The Respondent submits that the existence of a nexus between persecutory conduct and a Convention ground is a question of fact within the CRDD's expertise. As such, it should be accorded significant deference, and the appropriate standard of review is patent unreasonableness: *Mia v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 120 (QL) (F.C.T.D.). The CRDD panel's findings with respect to the issue of nexus, it is submitted, were not made in a perverse or capricious manner or without regard to the material before it.

[24] It is further submitted that by disassociating himself from Boca after witnessing the murders, the applicant did not express a political opinion. It was open to the CRDD panel to find that the applicant's actions did not amount to an expression of political opinion.

[25] In light of the evidence, I cannot conclude that the CRDD panel's decision was unreasonable. While there is evidence which suggests the applicant may be subjected to harm if he returned to Argentina, he still had to demonstrate that such harm or threat must be connected to his political opinion, or one of the other enumerated grounds in the definition of Convention refugee. This he has failed to do.

[26] The general principles governing fear based on political opinion are stated in *Ward, supra*, wherein the Supreme Court of Canada held that fear of persecution included the political opinion attributed to an applicant by those persecuting him or her. The Court further indicated that it was not necessary for the claimant's political opinion to be expressed or that the political opinion attributed to him or her by the persecutors be in accordance with his or her beliefs. The test is the authorities' perception of an applicant's activities; not what an applicant considers to be an expression of political opinion (his or her stand against violence and corruption).

[27] Refusing to participate in criminal activity, witnessing and/or reporting a crime have generally been found by this Court not to be in and of themselves expressions of political opinion attracting Convention refugee protection*:* for examples, see*Marvin v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 38 (QL) (F.C.T.D.); *Serrano v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 570 (QL) (F.C.T.D.); *Bencic v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 623 (QL) (F.C.T.D.). It has been held that there is no nexus to the Convention definition where the fear of persecution is unrelated to a political opinion and arises from being suspected of involvement in criminal activity, or subject to reprisals as a result of having knowledge that certain individuals committed crimes: *Mehrabani v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 427 (QL) (F.C.T.D.); *Bencic, supra*; *Garcia, supra*.

[28] Some cases have held that when criminal activity so permeates state action as to be part of its very fabric, that to oppose criminals acts may encompass opposition to the state authorities: *Vassiliev v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 955 (QL) (F.C.T.D.); *Demchuk v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1360 (QL) (F.C.T.D.). In such circumstances, there is no clear distinction between the anti-criminal and the ideological aspects of a claimant's fear of persecution.

[29] This case however is distinguishable. Here the applicant did not disclose any information to anyone concerning the identity of the perpetrators of the murders he witnessed nor the nature of the criminal activities in which Boca was involved.

[30] As I see it, the question that must be addressed by the Court on review is whether there was any evidence before the CRDD on which it could have found that the persecutors would have imputed a political opinion to the applicant. Did his refusal to get involved in criminal activities, witnessing two murders and subsequently deciding to disassociate himself from the group constitute an expression of political opinion?

[31] In light of these observations and a careful reading of the evidence, I cannot find that the applicant had a political opinion within the meaning of the definition stated by the courts.

[32] The applicant testified that should he reveal information about their criminal activities and having witnessed murders, Boca members could end up being detained. He never specifically stated that he was concerned about the persecutors in the event that he should reveal the connection between Boca and the police and politicians. He repeatedly felt threatened by Boca members only with respect to revealing their identity and activities.

[33] It was in the public domain that there was a relationship between Boca and some corrupt politicians and police officers. As stated above, what Boca was really concerned with was the revelation of the identity of the perpetrators and that this would curtail their activities. This does not, as counsel for the Applicant advances, engage the applicant's political opinion. The applicant would not, had he revealed Boca's criminal activities and the identity of the perpetrators, be disclosing the corrupt association since it was already common knowledge. The fact that the police and some politicians were bribed by Boca and were corrupted does not necessarily engage the applicant's political opinion. Boca was threatening the applicant strictly based on their perception that he was to reveal evidence to the authorities; there is absolutely no indication or proof that the threats were directed against the applicant because of his perceived political opinion.

[34] In my view, it is not for the CRDD or this Court to base its determination that a claimant has established a nexus to the Convention grounds on his subjective belief of what was the state of mind of the alleged persecutors. Moreover, nothing turns on the applicant's or counsel's opinion as to the beliefs of the alleged persecutors.

[35] In my view, the CRDD panel was entitled to find that the applicant's refusal to participate in random criminal activity while a member of Boca and his subsequent act of disassociating himself from the group had no political overtones and simply amounted to a refusal to become involved in criminal activities.

[36] The facts of this case are distinguishable from *Ward*; there was evidence that Ward was a member of the persecutory paramilitary terrorist group dedicated to the political union of Ulster and the Irish Republic. The act for which he feared persecution was his assistance in the escape of hostages he was guarding. The Supreme Court ruled that his act was politically significant, related to the means used for the achievement of political change. At pages 748-749, the Court emphasized the importance of the fact that Ward's act was perceived as the taking of a political stance rooted in political conviction:

To Ward, who believes that the killing of innocent people to achieve political change is unacceptable, setting the hostages free was the only option that accorded with his conscience. The fact that he did or did not renounce his sympathies for the more general goals of the INLA does not affect this. [page749] This act, on the other hand, made Ward a political traitor in the eyes of a militant para-military organization, such as the INLA, which supports the use of terrorist tactics to achieve its ends. The act was not merely an isolated incident devoid of greater implications. Whether viewed from Ward's or the INLA's perspective, the act is politically significant. The persecution Ward fears stems from his political opinion as manifested by this act.

[37] Of significant relevance to the case at bar is the decision in *Suarez v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1036 (QL) (F.C.T.D.) where the applicant left Colombia because he feared the drug lords in Cali. He had informed on them and then experienced retaliation. He had not sought police protection, convinced that they had been infiltrated by drug cartel members and would not protect him. The applicant argued that there was a political aspect to his action in informing on the drug lords because of their control to a significant extent of the state apparatus in Colombia. The respondent argued however that a political context similar to the one in *Ward* did not exist; in *Ward*, the applicant was the subject of persecution because of his political opinion that killing innocent civilians to achieve political ends was a political activity in which he would not participate. In *Suarez*, the applicant was satisfied that the conduct of the drug lords was morally and ethically reprehensible, and he personally refused to support their activities. The Court concluded that on the basis of the existing jurisprudence, the Board was correct to find that the threats to the applicant's life did not arise as a result of his perceived political opinion. There was no political context or motivation to his action, comparable to that which existed in the *Ward* case.

[38] In my view, the fact that the applicant in the present case may now become a victim of crime at the hands of Boca does not, without more, engage the ground of perceived political opinion and entitle him to refugee protection.

[39] Counsel for the applicant further contends that given the evidence of widespread corruption of Boca and of the involvement of police and politicians, the state was clearly "engaged". As a result, the threat of the applicant's disclosure as well as his departure from the group was clearly an expression of political opinion. Of great relevance is a decision which clearly contradicts this assertion. In *Palomares v. Canada (Minister of Citizenship and Immigration)* (2000), 5 Imm. L.R. (3d) 176 (F.C.T.D.), Pelletier J. (as he then was) stated the following at paras. 12, 15:

The same is true here. There is no evidence that the treatment to which the applicant was subjected was because of membership in a group. On the contrary, she is the object of violence because of a very personal characteristic, her ability to give evidence which could lead to a prosecution. Furthermore, there is no issue of association for reasons "fundamental to human dignity" in her conduct.

[...]

It is my view that these elements of proof do not suffice to establish the nexus which is required for refugee status. While denouncing corruption can be a political act, not every brush with corruption amounts to a political act or is perceived by the corrupt as a political act. The risk to which the applicant is exposed arises from her status as a witness to a crime. Even if members of the state apparatus are involved, the fact of making a complaint does not necessarily involve political action, nor does it mean that the complaint will be seen by them as political action.

[...]

(emphasis added)

[40] *A fortiori*, the facts in the present case reveal that there was no disclosure or complaint. In my view, the applicant has not established that his opposition to Boca's activities was based on a political position, even if the machinery of state government was somehow "engaged". As the Supreme Court of Canada held in Ward at page 750, "Not just any dissent to any organization will unlock the gates to Canadian asylum; the disagreement has to be rooted in a political conviction. This approach to Ward's case would preclude a former Mafia member, for example, from invoking it as precedent".

[41] Although I sympathize with the applicant, I find, as did Rothstein J. (as he then was) in *Mehrabani, supra,* that the perpetrators of the wrongful acts feared by the applicant did not threaten him with harm because of his political opinion, but because he had relevant evidence regarding their identity and criminal activities.

[42] Accordingly, I would dismiss this application for judicial review.

[43] At the termination of this hearing it was suggested that perhaps the following question be submitted for certification:

1) Whether a member of a criminal group associated with and used by state authorities will be perceived to have expressed a political opinion when he or she refuses to participate in illegal activities of such a group and later disassociates him/herself from the group.

[44] As I see it, this question is factually based and does not contemplate issues of broad significance or general application; in any event, it is not one that would be determinative of the appeal. Accordingly, I see no need to submit this question.

JUDGE

OTTAWA, Ontario

December 30, 2002

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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