Federal Court  Cour fédérale

Date: 20190613

Docket: IMM-5618-18

Citation: 2019 FC 809

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, June 13, 2019

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

WALTER MANCILLA OBREGON

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Preliminary remarks

> [31] Decision makers who are required to make findings of fact are often required to weigh the evidence presented and, against the backdrop of the burden and standard of proof, determine its sufficiency in relation to the matters in issue. Credibility assessments can be an important consideration when weighing evidence. However, a decision maker can also find evidence to be insufficient without any need to assess its credibility. One useful test in the present context is for the reviewing court to ask whether the factual propositions the evidence is tendered to establish,

> assuming them to be true, would likely justify granting the application for protection. If they would not, then the PRRA application failed, not because of any sort of credibility finding, but simply because of the insufficiency of the evidence. On the other hand, if the factual propositions the evidence is tendered to establish, assuming them to be true, would likely justify granting the application and, despite this, the application was rejected, this suggests that the decision maker had doubts about the veracity of the evidence. See *Liban v Canada (Citizenship and Immigration)*, 2008 FC 1252 at paras 13-14; *Haji v Canada (Citizenship and Immigration)*, 2009 FC 889 at para16; *Horvath v Canada (Citizenship and Immigration)*, 2018 FC 147 at paras 23-25 [*Horvath*].
>
> (*Ahmed v Canada (Citizenship and Immigration)*, 2018 FC 1207.)

II. Nature of the matter

[1] This is a request for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision rendered by a senior immigration officer of Immigration, Refugees and Citizenship Canada [the officer], rejecting the applicant's application for a Pre-Removal Risk Assessment [PRRA] on November 30, 2017.

III. Facts

[2] The applicant is a 40-year-old citizen of Columbia. When he arrived in Canada, his claim for refugee protection was deemed to be ineligible; however, he filed an application for a PRRA, which was rejected. It is this decision that is being challenged by the Applicant.

[3] The applicant's journey between Columbia and Canada lasted from 2001 to 2017 and took him to six other countries: Guatemala, Venezuela, Trinidad, Chile, Mexico and the United

States. In each country, the applicant was either subjected to threats or discrimination, or was extradited to his country of origin.

[4] According to the applicant, his departure from Columbia in 2001 was allegedly prompted by threats that were allegedly made against him by guerillas headed by an individual named Changüiry. When Changüiry's death was announced in 2002, the applicant reportedly returned to Columbia and opened a barber shop. However, in 2006 and 2007, the presence of guerillas, paramilitary groups and the army in his neighbourhood resulted in increased violence. The applicant claimed that barbers, including himself, were targeted in particular, because of the information that they had. The applicant indicated that he was questioned by the army and by the guerillas, and that the latter had also demanded that he become their informer, but that he had refused to do so.

[5] The applicant claims that he then become a military target for the guerillas, that they had gone to his home to look for him and that it was only because neighbours had called the army that he had been able to leave his home to go to Cali, accompanied by the army. He found a job there, but after being followed on two consecutive evenings by individuals that he knew to be members of a guerilla group, he decided to leave for Guatemala where he obtained refugee status in 2012. He reports that he was a victim of discrimination, threats and violence in that country, which allegedly drove him to leave Guatemala.

[6] The applicant contends that in 2014, he learned that his spouse had been involved in the arrest of a woman known as La Chili, because she had been acting as an undercover agent. Since

there was video footage that apparently featured his wife at the time of the arrest, he indicates that he decided to go to Chile in order to avoid the impending danger. Eventually, they allegedly decided to make their way to Canada and his spouse was the first to do so. The applicant's mother died before he left for Canada and the applicant alleges that there was an attempt to assassinate him during the funeral in March 2016.

[7] On June 13, 2016, the applicant applied for a visa in order to visit his wife in Canada and on July 7, 2016, his application was denied. On March 26, 2017, the applicant entered the United States with the help of a smuggler. On June 26, 2017, he was intercepted by the RCMP while attempting to enter Canada illegally. On July 5, 2017, an exclusion order was issued against the applicant. The applicant was offered an opportunity to apply for a PRRA, which he did on July 27, 2017.

[8] In his application for a PRRA, the applicant indicated that he feared for his life because he was a member of a social group of barbers and that members of this group were targeted in Columbia in order to provide information.

IV. Decision rendered by the PRRA officer

[9] The PRRA officer limited his analysis to Columbia and denied the application for a PRRA because the applicant did not provide any evidence to prove the allegations, particularly the allegations concerning his relationship with his spouse and events that they had experienced.

[10] The PRRA officer conducted independent research in order to verify whether barbers were in fact targeted by criminal groups and he did not find any information in this regard. The information consulted by the officer indicated that [TRANSLATION] "paramilitary groups, FARC and/or guerillas (names sometimes used interchangeably), target all residents, including civilians and that anyone could be a victim of the members of these groups" (Decision, page 6). The officer concluded that the risk was general in nature. He went further by indicating that "the case law therefore concludes that being targeted by criminals in a context of generalized violence, even if these criminals are specifically seeking a particular individual, is not enough to find that there is a personalized risk" (Decision, page 7). In the applicant's specific case, the officer did not believe that being part of a group of barbers would justify the sustained attention of armed groups.

[11] The officer therefore concluded that the applicant failed to demonstrate a personalized risk of persecution, within the meaning of section 96 of the IRPA, and failed to establish that he would face a danger of torture, risk to life or risk of cruel and unusual treatment or punishment within the meaning of paragraphs 97(1)(a) and (b) of the IRPA if he were to return to Columbia.

V. Issues

[12] The applicant raised the following questions:

- Did the panel violate the rules of procedural fairness by rendering a decision without a hearing?

- Did the panel render an unreasonable decision by failing to consider the evidence on record?

- Did the panel commit an error of law in justifying its negative decision on the basis of section 97?

[13] With respect to the standard of review applicable to decisions concerning PRRAs, Mr. Justice Denis Gascon, in the decision rendered in *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 [*Huang*], provided a comprehensive review in paragraphs 10 to 17. Like Gascon J., the Court found that "when the issue raised on judicial review is whether a PRRA officer should have granted an oral hearing, the standard of reasonableness applies" (para 16). The standard of review applicable to the issue of whether the officer properly assessed the evidence on record is reasonableness (*The Minister of Citizenship and Immigration v Flores Carrillo*, 2008 FCA 94 at para 36 and *Huang*, supra, at para 10). The same applies for questions of law, which must be reviewed on the standard of reasonableness (*Thamotharampillai v Canada (Citizenship and Immigration)*, 2016 FC 352 at para 17-18).

[14] This Court must therefore show deference to the decision rendered by the officer and only intervene if the officer's decision is not justified, transparent, intelligible and defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VI. Relevant Provisions

[15] The following provisions of the IRPA and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [[IRPR] are relevant:

Convention refugee	**Définition de « réfugié »**
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	**Personne à protéger**
97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au

Article 1 of the Convention Against Torture; or

sens de l’article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l’incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Application for protection

112 (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

Demande de protection

112 (1) La personne se trouvant au Canada et qui n’est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

Hearing — prescribed

Facteurs pour la tenue d’une

factors	**audience**
167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	**167** Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

VII. Analysis

A. *Did the panel violate the rules of procedural fairness by rendering a decision without a hearing*

[16] In this case, since the applicant's claim for refugee protection was deemed ineligible, no hearing was held for the claim. For its part, the application for a PRRA was reviewed solely on the basis of the documentation provided. The applicant therefore argues that procedural fairness would require that a hearing be held, since his application was denied further to a finding of a lack of credibility. Also according to the applicant, the case law dictates that in such a situation, the officer is required to assess the applicant's credibility in the context of a hearing (*Cho v*

Canada (Citizenship and Immigration), 2010 FC 1299 at para 29 and *Garza Galan v Canada (Citizenship and Immigration)*, 2008 FC 135 at paras 8 to 23).

[17] Section 167 of the IRPR provides the decision-making framework for holding a hearing in the context of a PRRA. According to the applicant, his situation is consistent with the requirements set out in this section.

[18] For its part, the respondent submits that the officer denied the application based solely on a lack of evidence. More specifically, the applicant did not submit any evidence to demonstrate that barbers were a group targeted by criminal groups, when, according to the respondent, the case law requires risks identified by the applicant to be supported by objective and independent evidence (*Belaroui v Canada (Citizenship and Immigration)*, 2015 FC 863 at para 17). According to the respondent, the same applies for the lack of evidence concerning the applicant's wife, their child and the video footage that apparently features his wife during the arrest of La Chili. According to the respondent, this lack of evidence prevented the officer from assessing the risk to which the applicant was exposed because of his affiliation to his spouse.

[19] At this point, it is worth recalling the two sources of fears alleged by the applicant: first, the fact that he was a barber and second, his relationship with his spouse. The officer stated that it was the applicant's responsibility to provide evidence in support of his application.

[20] The Court agrees that the applicant must provide available evidence to support his application. In this case, no evidence related to his relationship with his spouse or the publically

available video footage featuring his wife during the arrest of La Chili was submitted and no explanation was provided to explain the absence of evidence. However, the applicant should have been able to provide this evidence. When an officer can expect to receive evidence, the applicant will find it difficult to reverse the situation and request that the missing evidence be replaced by his word alone (*Nhengu v Canada (Citizenship and Immigration)*, 2018 FC 913 at para 9).

[21] However, the situation is different with respect to the threats that the applicant allegedly received because he is a barber. According to the officer, the applicant is exposed to a generalized risk, since there is no evidence to demonstrate that barbers are targeted. Even if the officer is right on this point, he could not conclude that the personal threats which the applicant claimed to have received failed to render his fears personalized in nature.

[22] In the context of the analysis of section 97 of the IRPA, the officer's interpretation of the case law is erroneous when he states that "the case law therefore concludes that being targeted by criminals in a context of generalized violence, even if these criminals are specifically seeking a particular individual, is not enough to find that there is a personalized risk" (Decision rendered by the officer, page 7, paragraph 2). On the contrary, this Court has reiterated many times that if an individual is being personally targeted, the violence feared can no longer be solely equated with a context of generalized violence (*Correa v Canada (Citizenship and Immigration)*, 2014 FC 252 at para 46 and *Ore v Canada (Citizenship and Immigration)*, 2014 FC 642 at para 39). The fact of being personally exposed to a risk should not be confused with being personally targeted, as only the former could happen in a context of generalized violence.

[23] Since the applicant asserted that he received death threats and the officer did not assess or question the applicant's credibility, how can he conclude that the applicant was not targeted by threats that would make him eligible for Canada's protection? The officer therefore committed a reviewable error in finding that the applicant was not a person in need of protection, when he did not question the applicant's word concerning the death threats that he claimed to have received.

[24] Based on the foregoing, the Court finds that the decision is not reasonable and consequently, it is therefore not necessary to analyze the other points raised by the applicant.

VIII. Conclusion

[25] For the above reasons, this application for judicial review is allowed.

JUDGMENT in Docket IMM-5618-18

THIS COURT RULES AND ADJUDGES that the application for judicial review is allowed, the decision is set aside and the file is referred back to another officer for reconsideration. There is no question of general importance to be certified.

"Michel M.J. Shore"
Judge

Certified true translation

This 5th day of July, 2019.

Daniela Guglietta, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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