Federal Court  Cour fédérale

Date: 20200415

Docket: IMM-5843-18

Citation: 2020 FC 515

Ottawa, Ontario, April 15, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

THEO DEWAYNE CALLENDER

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision made on September 13, 2018 by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB], in which it found that the Applicant, Theo Dewayne Callender, was not a Convention refugee or a person in need of protection [Decision].

[2] For the reasons that follow, this application is granted.

II. **Background Facts**

[3] The Applicant is a citizen of Barbados. While in Barbados, the Applicant was incarcerated from November 2004 to June 2005 after being convicted for uttering false cheques and for possession of marijuana.

[4] In March 2005, the Applicant witnessed an inmate murder another inmate during a prison riot. In his refugee claim, the Applicant stated that the inmate who committed the murder, and his affiliates, had been released from jail and wanted to kill the Applicant to prevent him from reporting the murder to the police.

[5] The Applicant came to Canada for a visit in January 2010. He returned to Barbados in January 2011.

[6] In February 2011, the Applicant was threatened by the inmate and his affiliates at a football match. In April 2011, the inmate and his affiliates confronted the Applicant in the street. The Applicant escaped by running away and flagging down a minivan, but the assailants fired series of gunshots and a bystander was shot. The Applicant did not report either of these incidents to police, but went into hiding for several months before leaving Barbados.

[7] The Applicant arrived in Canada in June 2011. The Applicant did not make a claim for refugee protection because the purpose of his visit was to visit his spouse.

[8] In November 2011, the Applicant was convicted of assault, pointing a firearm, and uttering threats and was incarcerated in Canada. While the Applicant was incarcerated, a fellow inmate who was also from Barbados told him that he should not return to the country, because the inmate who had committed the murder was still looking for the Applicant.

[9] The Applicant made a refugee claim on January 5, 2012. Around that time, he was acquitted of other criminal charges brought against him in Canada. The RPD determined that these charges had no bearing on its adjudication of the Applicant's refugee claim.

III. **Decision under review**

[10] The RPD found that the determinative issues were the nexus in respect of the claim under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], the harm feared in respect of the claim under section 97 of *IRPA*, and credibility.

[11] The RPD found that, on a balance of probabilities, the Applicant's fear was not linked to any of the five grounds in the Refugee Convention. The Applicant feared that he would be targeted for having witnessed a murder, but this fear did not have a nexus to a Convention ground.

[12] The RPD cited *Kang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1128 for the principle that being a victim of crime, corruption, or personal vendettas generally cannot establish a link between fear of persecution and a Convention ground. While being a member of a particular social group is a recognized ground under section 96 of *IRPA*, victims of crimes are not, on their own, a particular social group. The RPD concluded that because the Applicant's fear

was based on a personal vendetta against him, and because the documentary evidence indicated that crime is prevalent in Barbados and perpetrated by various actors, there was no nexus to section 96 of *IRPA*.

[13] The RPD then found that it was more probable than not that the Applicant would not face a danger of torture or a risk to his life or a risk of cruel and unusual treatment or punishment if returned to Barbados, and so he was not entitled to protection under section 97 of *IRPA*.

[14] The RPD stated that the Applicant was required to show, on a balance of probabilities, that adequate state protection from a criminal vendetta was not available to him in Barbados. The RPD noted there is an underlying presumption that a state, unless in a state of complete breakdown, is able to protect its citizens; but that it is open to the Applicant to rebut this presumption by presenting clear and convincing evidence to the contrary.

[15] The RPD found that the Applicant failed to rebut the presumption of state protection. The RPD noted that the Applicant failed to report the two encounters with the inmate and his affiliates to the police. The RPD also found that the objective documentary evidence, including the United States Department of State "Barbados 2017 Human Rights Report", did not establish a lack of state protection in Barbados.

[16] The RPD noted the Federal Court of Appeal's statement in *Canada (Minister of Citizenship and Immigration) v Kadenko*, (1996) 143 DLR (4th) 532, that the burden of proof on an applicant increases with the level of democracy of the state in question. The RPD noted that Barbados was a democracy, and reviewed the structure of the police forces and police oversight bodies in Barbados. The RPD concluded that there was no objective evidence to support the

Applicant's belief that the police are not willing to protect him, and if he holds that belief, there are avenues open to him to seek redress.

[17] The RPD also found that the country condition documents suggest that there is operationally adequate state protection for victims of crime in Barbados, and that the state is making serious efforts at both legislative and operational levels, to address the problem of criminality. The RPD concluded that, on a balance of probabilities, the police in Barbados provide adequate protection for its citizens, particularly those who are targets of criminals and criminal activity.

[18] The RPD found that the Applicant was not a credible witness in respect of the allegation that the inmate was still looking for him in 2018. It was implausible that the Applicant would be pursued by a former inmate more than 13 years after the alleged incident.

[19] The RPD found that the Applicant's statement that his mother was threatened in Barbados in 2018 was not credible. The Applicant provided no credible or persuasive evidence to corroborate this event. The RPD also noted that there had been no incidents between the inmate and the Applicant's family between 2011 and 2018, and found that this incident was fabricated to bolster the contemporaneity of the Applicant's fear and his claim for protection.

[20] The RPD found that the letter and affidavit submitted by the Applicant's friend in Barbados had no probative value, were self-serving, and did not assist the panel in making a finding that the April 2011 incident between the inmate the Applicant occurred. The RPD found that the Applicant did not seek police protection in Barbados, and that there was no evidence before the panel that the Applicant was unable to obtain state protection had he sought it.

[21] The RPD found that the Applicant was not a credible witness in respect of the allegation that the inmate had an active criminal vendetta against him more than seven years after the Applicant left Barbados. Considering the Applicant's testimony that everyone in Barbados would soon know his whereabouts if he returned, the RPD found it did not make sense that it would take a powerful criminal more than seven years to find and threaten the Applicant's mother. It did not make sense for the inmate to renew his vendetta against the Applicant in 2018 based on an incident that allegedly occurred 13 years earlier in front of various witnesses during an uncontrolled riot.

[22] The RPD concluded that, having considered all the evidence, the Applicant had not established that there is more than a mere possibility of persecution on any Convention ground or that, on a balance of probabilities, he would personally be subjected to a danger of torture or face a risk to life or a risk of cruel and unusual treatment or punishment if he returned to Barbados.

IV. **Legislation**

[23] For reference, sections 96 and 97 of the *IRPA* are set out in the attached Appendix.

V. **Issues and Standard of Review**

[24] The Applicant takes issue with the RPD finding that state protection was available to him and states that the panel erred in making negative credibility findings. He also alleges that his former counsel acted incompetently, resulting in a breach of natural justice.

[25] As this matter can be determined on the issue of the RPD's erroneous analysis of the risk for which the Applicant would need state protection, it is not necessary to consider the other issues.

[26] There is now a presumption that the standard of review of an administrative decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. at para 10. The presumption can be rebutted where the legislature indicates it intends a different standard to apply or, the rule of law requires a correctness review. Neither is the case in this application.

[27] The standard of review of the Decision is reasonableness, which is the basis upon which this case was argued.

[28] *Vavilov* has not changed the focus of previous jurisprudence. The well-known administrative law requirement that the reasons demonstrate that a decision is transparent, intelligible and justified remains alive and well: *Vavilov* at para 15. Rather, *Vavilov* has sharpened the focus by confirming that both the reasoning process and the outcome of a decision are to be considered in assessing whether a decision is reasonable: *Vavilov* at para 86.

VI. **Analysis**

[29] The Applicant argues that the RPD did not properly establish his profile when assessing whether he could avail himself of state protection. As a result, the RPD did not assess his ability to access state protection based on a consideration of similarly situated persons. He also alleges

that the panel erroneously interpreted the evidence in the National Documentation Package (NDP) thereby failing to fully evaluate the operational adequacy of state protection in Barbados.

[30] The Respondent argues that the Applicant failed to make out a nexus to a Convention ground for either section 96 or 97 of the *IRPA* as "crime" is not a social group; nor is a vendetta a social group.

[31] The analysis to be conducted under section 97 differs than the section 96 analysis. In *Prophète v Canada (Citizenship and Immigration)*, 2009 FCA 31, at paragraphs 6 and 7, the Court of Appeal described the difference this way:

> [6] Unlike section 96 of the Act, section 97 is meant to afford protection to an individual whose claim "is not predicated on the individual demonstrating that he or she is [at risk] … for any of the enumerated grounds of section 96" (*Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] 3 F.C.R. 239 at paragraph 33).
>
> [7] The examination of a claim under subsection 97(1) of the Act necessitates an individualized inquiry, which is to be conducted on the basis of the evidence adduced by a claimant "in the context of a *present* or *prospective* risk" for him (*Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99 at paragraph 15) (emphasis in the original). As drafted, the certified question is too broad.
>
> (My emphasis)

A. *Profile of the Applicant*

[32] In analyzing the nexus of the Applicant's fear of harm to a Convention ground the RPD described it as follows:

> A convicted criminal was allegedly seeking the claimant because the claimant witnessed this man kill another man in prison. The panel determines that this is not a sufficient ground to constitute

> member in a "particular social group." The panel finds, on a balance of probabilities, that the claimant's fear, of an act of criminality at the hands of a criminal for having witnessed a prison murder, is not linked to any of the five Convention grounds.

[33] In conducting the section 97 analysis, the RPD characterized the Applicant not as a witness to a crime but rather as a "victim of crime" and "a target of a personal vendetta" who was being sought because he "might tell the authorities about the man's crime committed in jail." The RPD concluded that any threat to the Applicant flowed from the initial act, which was a crime.

[34] Having characterized the Applicant's profile in that manner, the RPD found that this Court has held the victims of crime, corruption, or vendettas generally fail to establish a link between their fear of persecution and one of the Convention grounds. It was for that reason that the section 96 claim of the Applicant failed.

[35] The RPD then considered whether the Applicant was a person in need of protection under section 97. It stated the task was to determine whether, on a balance of probabilities, there were substantial grounds to believe that the Applicant will be tortured, or at risk of losing his life or being subjected to cruel and unusual treatment or punishment if he returned to Barbados. The RPD correctly stated that documentary evidence illustrating systemic and generalized violation of human rights would not be sufficient to ground a section 97 claim unless it could be linked to the Applicant's specific circumstances.

[36] It was in considering the nature of the specific circumstances faced by the Applicant that the panel's analysis went awry.

[37] The RPD described the Applicant's specific circumstances as a criminal vendetta. It did not consider the risk to the Applicant as a witness to murder.

[38] During submissions at the end of the hearing, the RPD interrupted the Applicant's counsel and accepted that the Applicant had a subjective fear:

> Let me help you on one aspect of the credibility. First of all, there's somebody he fears, okay, that we've established, on a balance of probabilities, is probably a criminal; and, two, that there's a subjective fear. Right. There's a subjective fear established here. [. . .] If I saw something, saw it happen, I'd be afraid too. Right. But we look at the objective basis.

[39] The Applicant then submitted to the RPD that his claim was based on the risk he would face if he were deported to Barbados. Given the small size of Barbados and that the perpetrator had affiliates, it was submitted that it was likely the perpetrator or his associates would be able to find the Applicant. The Applicant argued that this made his fear reasonable.

[40] In his submissions, the Applicant specifically mentioned there were hierarchies of criminality, such as biker gangs. He said that because there are limits to what police can do, even in Canada, when an individual fears gangs, in some situations, individuals are put in witness protection.

[41] The Applicant specifically said that he was not running away from a high crime rate but was running away from a particular individual who may have criminal associates able to exercise the perpetrator's will.

[42] The RPD took the specific risk to the Applicant of being a witness to murder, who would require witness protection if they reported the crime, and generalized the risk to be one of basic criminality. At the conclusion of the state protection analysis the RPD found:

> The risk faced by this claimant is the risk of criminal activity being perpetrated against him. The risk faced by the claimant is no greater than the risk faced by the population at large.

[43] By mischaracterizing the specific and personalized nature of the risk faced by the Applicant the RPD failed to take into account the actual nature of the risk faced by the Applicant, which is discussed below.

B. *The implausibility finding*

[44] The dominant reason put forward by the RPD for finding there was no risk to the Applicant was the passage of time since the murder occurred. The RPD found it to be implausible that the perpetrator would pursue the Applicant more than 13 years after the murder occurred.

[45] The RPD raised this issue with the Applicant in the hearing by asking him "why would this person be interested in you in 2018?"

[46] The Applicant's answer was that it was because he saw something that could put the perpetrator back in jail and his presence in Barbados would be a threat to the perpetrator.

[47] As mentioned earlier, the RPD specifically curtailed the Applicant's submission when it agreed there was a subjective fear. Noting that the Applicant "saw something", the panel said

that if they had seen it, they would be afraid too. Of course, the "something" was accepted to be witnessing the perpetrator commit murder.

[48] It is well known that "plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant": *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776.

[49] Other than the passage of time itself, no reason was given by the RPD for this implausibility finding.

[50] To go from finding that the Applicant, having witnessed the murder, possessed a subjective fear, to finding it was implausible that the perpetrator would not be interested in him 13 years later is not rational nor is it based on clear and convincing evidence. It is far from self-evident that if an eye-witness to a murderer's crime was alive and back in the country, it would be of no interest or concern to the murderer.

[51] Although the panel gave a passing nod to the Applicant's risk as a witness to murder, whom the perpetrator would want to harm in order to not be held accountable for his past criminal acts, it did not analyze that risk. Instead, the RPD continued to analyze the risk of a criminal vendetta or criminal activity.

[52] The problem with mischaracterizing the nature of the risk has been described by Madam Justice Gleason, at the time a member of this Court, as follows in *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678, at paragraph 40:

> [40] In my view, the essential starting point for the required analysis under section 97 of IRPA is to first appropriately determine the nature of the risk faced by the claimant. This requires an assessment of whether the claimant faces an ongoing or future risk (i.e. whether he or she continues to face a "personalized risk"), what the risk is, whether such risk is one of cruel and unusual treatment or punishment and the basis for the risk. Frequently, in many of the recent decisions interpreting section 97 of IRPA, as noted by Justice Zinn in *Guerrero* at paras 27-28, the "… decision-makers fail to actually state the risk altogether" or "use imprecise language" to describe the risk. Many of the cases where the Board's decisions have been overturned involve determinations by this Court that the Board's characterization of the nature of the risk faced by the claimant was unreasonable and that the Board erred in conflating a highly individual reason for heightened risk faced by a claimant with a general risk of criminality faced by all or many others in the country.

[53] Based on my reading of the Decision, and the underlying record, including the transcript, the RPD did not precisely describe the risk. That led it to find there was only a general risk to the Applicant, rather than a personalized risk. In turn that prevented the RPD from undertaking an individualized inquiry of the present and future risk to the Applicant in Barbados.

[54] The importance of the nature of the risk cannot be understated. This Court has held more than once that where a person is specifically and personally targeted for death by a gang in circumstances where others are generally not, then he or she is entitled to protection under s. 97 of the Act if the other statutory requirements are met: *Guerrero v Canada (Citizenship and Immigration)*, 2011 FC 1210, at para 34.

VII. **Conclusion**

[55] For the reasons set out above, I find the reasons set out by the RPD show that the Decision is not based on an internally coherent chain of reasoning nor is it justified in light of the relevant legal and factual constraints. The result is that it the Decision is not reasonable: *Vavilov* at para 85.

[56] The Decision will be set aside and the matter returned for redetermination by a different panel.

[57] Neither party suggested a serious question of general importance for certification, nor does one arise on these facts.

[58] No costs are awarded.

JUDGMENT in IMM-5843-18

THIS COURT'S JUDGMENT is that:

1. The application is granted and the Decision is set aside.
2. The matter is returned for redetermination by a different panel.
3. There is no serious question of general importance for certification.
4. No costs.

"E. Susan Elliott"
Judge

APPENDIX

Immigration and Refugee Protection Act, SC 2001, c 27

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	a) soit au risque, s'il y a des motifs sérieux de le croire,

torture within the meaning of Article 1 of the Convention Against Torture; or

d’être soumise à la torture au 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.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d’une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT

SOLICITORS OF RECORD

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