Federal Court  Cour fédérale

Date: 20110408

Docket: IMM-6303-10

Citation: 2011 FC 437

Ottawa, Ontario, April 8, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

DOUGLAS ALEXANDER ALVAREZ ARIAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Applicant, a citizen of Guatemala, came to Canada on March 4, 2010 and made a claim for refugee protection. In a decision dated September 8, 2010, the Applicant was found to be inadmissible to Canada due to his involvement with the Mara Salvatrucha (MS-13) gang and, thus, ineligible to be referred to the Refugee Protection Division pursuant to s. 101(1)(f) of the

Immigration and Refugee Protection Act, SC 2001, c. 27 (*IRPA)*. As permitted by s. 112 (1) of *IRPA*, the Applicant filed an application for protection (a pre-removal risk assessment or PRRA). In a decision dated October 22, 2010, a PRRA Officer denied the PRRA application. The Applicant seeks judicial review of this decision.

II. Issues

[2] This application raises the following issues:

1. Did the PRRA Officer err in his assessment of state protection:

    a) by ignoring evidence; and

    b) by failing to appreciate the nature of the Applicant's risk?

[3] The parties acknowledge that the Officer's decision is reviewable on a standard of reasonableness. As taught by the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at paragraph 47:

> [R]easonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

III. Analysis

A. *General Comments*

[4] The presumption is that a state is capable of protecting its citizens (*Canada (Attorney General) v Ward*, [1993] 2 SCR. 689, 20 Imm LR (2d) 85 [*Ward*]*; Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 63 Imm LR (3d) 13 [*Hinzman*]), and an individual has a duty to seek protection from his own country of origin before seeking refugee protection in Canada. The presumption can only be rebutted where the Applicant can provide "clear and convincing" evidence that his or her country of origin is unwilling or unable to protect its citizens or that his or her attempt to seek protection was useless.

[5] The Applicant submits that, given the "overwhelming" evidence before the PRRA Officer of Guatemala's inability to protect persons who are targeted by gang members, the PRRA Officer's conclusions were unreasonable. During oral submissions, the Applicant's arguments focused on three key concerns:

(a) the Officer ignored or misapprehended evidence that pointed to an inability of the state to protect him from gang members and from the police;

(b) the Officer erroneously relied on alternative institutions to provide protection to him; and

(c) the Officer ignored the dangers posed to the Applicant by his gang-related tattoos.

[6] I will consider each of these concerns.

(a) *Ignored or misapprehended evidence*

[7] The Applicant submits that the PRRA Officer erroneously cited from the three reports referred to in the Officer's decision and that the Officer failed to have regard to newer documentary evidence that was submitted by the Applicant in his PRRA application. The Applicant submits that the evidence demonstrates clearly that the state is unable to protect the Applicant. The Applicant argues that the evidence demonstrates that the police have inadequate training and resources to offer protection, and that the police are corrupt and are themselves responsible for serious abuses in Guatemala, corroborating the Applicant's experience and beliefs that state protection is not available to him. In the Applicant's submission, the fact that he bears a tattoo identifying him as a member of the MS-13 places him at a heightened risk from the police.

[8] The first point that I would make is to reiterate that it is the Applicant's burden to rebut the presumption of state protection. In doing so, the Applicant must show that he first attempted to access any state protection that was available to him in Guatemala, before claiming refugee protection. The Applicant has not done so. After being shot, the Applicant, with information pertaining to other unreported incidences with the same gang, merely informed the police about the one incident but failed to provide them with any specifics so they could investigate the complaint.

[9] As noted by the PRRA Officer, on the subject of why he did not initially tell his family or the police about the first or second incident with the gang, the Applicant's explanation was the following:

> I did not feel like my family or I could go to the police to complain because the police are considered corrupt in Guatemala. They did not really do anything to protect people from gangs and seemed more interested in bribing people for money. We were also very worried that it would get back to the gang and we would be targeted even more.

[10] This "explanation" by the Applicant is not sufficient; the requirement is that the Applicant must first approach his home country for protection before seeking international refugee protection (*Hinzman*, above).

[11] Further, even if the PRRA Officer, or the Court, were to accept that state protection was unavailable to him, the Applicant has not submitted evidence to support a conclusion that he is personally at risk. Specifically, the PRRA Officer referred to the following:

- the Applicant submitted general articles and reports of widespread risks for all citizens of Guatemala and the Applicant is not named in any of the articles;

- the Applicant did not provide corroborating evidence to confirm that he attended a health care centre;

- the Applicant did not provide an affidavit from his father to support the incidents as cited by the Applicant;

- the Applicant did not provide any documentation from family members in Guatemala to support his claim that they have been approached by gang members; and

- the last incident occurred 5.5 years ago and the evidence does not support the conclusion that gang members are actively seeking or are interested in the Applicant today.

[12] The PRRA Officer recognized that there are continuing problems in Guatemala and that the police were not always successful in protecting its citizens. However, the PRRA Officer noted the following:

- Guatemala is a democratic, multiparty republic;

- joint police and military operations under the National Civilian Police continued in Guatemala City high-crime areas as well as other areas;

- the Office of Professional Responsibility conducted internal investigations of misconduct by police officers;

- at the end of 2009, 5,260 military officers and soldiers had received human rights training provided by the Ministry of Defence;

- domestic and international human rights groups operate without government restriction in Guatemala and are able to investigate and publish their findings on human rights cases;

- the Government has a Human Rights Ombudsman who reports to the Congress and monitors the human rights set forth in the constitution;

- a law legalizing both wiretapping and the use of double agents was adopted in order to fight organized crime more effectively;

- a hotline for reporting extortion was set up. After a report is made, patrols are increased in the threatened areas;

- 33 gang members were arrested by the National Civilian Police anti-gang squad in January 2006. Five thousand gang members were arrested in December 2005; and

- in April 2006, 11,000 soldiers were deployed in the streets to re-establish security.

[13] I agree with the Respondent that the evidence is not so “clear and convincing”, as the Applicant would like us to believe (*Canada (Minister of Employment and Immigration) v Villafranca* (1992), 18 Imm LR (2d) 130, 99 DLR (4th) 334 (FCA)).

[14] In addition, the PRRA Officer did not ignore recent reports contained in the Applicant's evidence which demonstrates that Guatemala is overwhelmed by gang violence and corruption. Citing a number of documents that were not explicitly referred to in the decision, the Applicant asserts that the PRRA Officer ignored evidence. The Applicant asserts that in the face of this significant evidence, the PRRA Officer should have explained why this evidence was rejected.

[15] As reflected in the decision, the PRRA Officer recognized the essence of all of the articles and documents before him. He acknowledged that there are problems in Guatemala. The PRRA Officer weighed this evidence, against the totality of the documentary record, but found that there was adequate state protection available to the Applicant in Guatemala. The PRRA Officer does not have to refer to every piece of evidence and is assumed to have weighed all of the evidence before him or her. The PRRA Officer must "simply provide an adequate explanation on the basis upon which the decision was reached" (*Clifford v Ontario,* 2009 ONCA 670, [2009] WDFL 4624, leave dismissed, [2009], SCCA No 461 (QL)). In my opinion, this was done by the PRRA Officer.

(b) *Alternative Institutions*

[16] The Applicant submits that the PRRA Officer erroneously relied on alternative institutions, such as human rights organizations and complaint mechanisms against corruption as a viable method of protection. The Applicant submits that this is precisely the type of protection the Federal Court warned against in *Zepeda v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 491, [2009] 1 FCR 237 [*Zepeda*] where Justice Tremblay-Lamer stated at paragraph 25:

> I am of the view that these alternate institutions do not constitute avenues of protection per se; unless there is evidence to the contrary,

> the police force is the only institution mandated with the protection of a nation's citizens and in possession of enforcement powers commensurate with this mandate. For example, the documentary evidence explicitly states that the National Human Rights Commission has no legal power of enforcement ("Mexico: Situation of Witness to Crime and Corruption, Women Victims of Violence and Victims of Discrimination Based on Sexual Orientation").

[17] The Applicant asserts that, “the police force is the only institution mandated with the protection of a nation’s citizens and in possession of enforcement powers commensurate with this mandate” (*Zepeda*, above, at para 25).

[18] In my view, the PRRA Officer was not implying that these organizations would preclude, or be an alternative to, approaching the police. My interpretation of the decision is that these references were merely suggesting an additional avenue of protection available to the Applicant. The Applicant did not approach any of these institutions. However, it was not unreasonable for the PRRA Officer to make reference to them.

(c) *The tattoos*

[19] Finally, in both oral and written submissions, the Applicant made much of his MS-13 tattoos. Although he did not submit photos to corroborate this aspect of his claim, the Applicant claimed (in his PRRA affidavit) that he has a number of body tattoos. With respect to his gang membership, he has sworn that he has the letter “M” on his right arm, the letter “S” on his left arm and the gang’s full name on his back.

[20] I agree that, if the tattoos exist and identify the Applicant as a member of the MS-13 gang, the Applicant may come to the attention of the police force – particularly a force that is making serious efforts to curb MS-13 gang activity. I can accept that a person with a MS-13 tattoo, if caught by the police, would likely be suspected of being a member of the gang. However, two things are lacking in this case: (a) submissions of this particular risk to the PRRA Officer; and (b) evidence that, coming to the attention of the police would result in a risk to the Applicant's life or a risk of cruel and unusual treatment or punishment at the hands of the police.

[21] In submissions to the PRRA Officer, counsel stated that "although seeking to disassociate themselves from gangs, they may continue nevertheless to be perceived as members, for instance, because of remaining gang tattoos". The allegation made appears to be that the MS-13 gang would search the Applicant for signs of a tattoo to infer that he is or was a gang member, thereafter punishing him for desertion.

[22] This is a bold theory. The support for this statement is contained in a new set of guidelines published by the United Nations High Commissioner for Refugees entitled, "*Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*" (UNHCR Report). In a footnote to the submissions for the PRRA Application, the Applicant's counsel cites one paragraph in the lengthy UNHCR Report. I first observe that the UNHCR Report is a general report. While there are some references to Central American gangs, the report is not intended to be an indictment of the MS-13 gang in Guatemala. I have carefully read the referenced page and can find no statement to support the fear claimed. The cited passage contains reference to a typical gang membership being displayed by "common attire, adherence to a certain dress code, hairstyle, jewellery and/or body tattoos and

other identifying marks on the body". The text continues on to state that gangs have moved away from "these traditional identifiers in order to remain more clandestine in their activities". In particular, the citation does not state that gangs search for tattoos and punish escaped gang members accordingly. The Officer did not err by failing to refer to the UNHCR Report on this point since it did not support the statement made by the Applicant's counsel.

[23] The second argument with respect to the tattoos is that the police would use the tattoos to perceive the Applicant as a gang member. In both written and oral submissions to this Court, the Applicant submitted that the Officer ignored evidence that police officers target former gang members. The Applicant describes the documentary evidence as stating that police frequently force youth to take off their shirts to see if they have any tattoos. In the view of the Applicant, this evidence that would put the Applicant at a higher risk than the general population and was ignored by the PRRA Officer.

[24] The main problem with this submission is that it was not made in the Applicant's submissions to the PRRA Officer. Nowhere – either in his own PRRA affidavit or in the counsel's submissions – does the Applicant assert that he would be at risk of death or cruel and unusual treatment from the police because of his tattoos. In his PRRA affidavit, the Applicant states that "no one wanted to give me a job because of my tattoos" and "people there will not give me work opportunities because of my tattoos". The Applicant also mentions that American immigration officers and American police officers identified the Applicant as a gang member because of his tattoos. However, there is no allegation that the Applicant would be at risk from Guatemalan police

because of his tattoos. I acknowledge that, buried at p. 220 of the Applicant's voluminous PRRA submissions, there is one brief reference as follows:

> The police frequently force youth to take off their shirts to see if they have any tattoos. They order youth to strip down to their boxers and lie on the ground, often in public places where crowds can witness the shaming. Sometimes police rob the youth, leaving them half-naked and penniless.

[25] The Officer did not have an obligation to ferret out this short passage when the risk, now being argued, did not form part of the PRRA submissions. Moreover, at the age of 30 (as he now is), the Applicant cannot be considered to be a "youth". Based on this minimal evidence, any risk to the Applicant that meets the criteria for a s. 97 claim is, at best, speculative.

[26] Briefly stated, the Applicant, in his PRRA submissions describes his tattoos but alleges only that they might prevent him from getting work in Guatemala. The Officer cannot be faulted for not addressing a risk that was not clearly identified in the PRRA Application.

IV. Conclusion

[27] In sum, the PRRA Officer's state protection analysis was thorough and complete. The Applicant is merely asserting a different interpretation of the evidence before the PRRA Officer. I cannot conclude that the PRRA Officer's decision was outside of the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, para 47).

[28] Neither party proposes a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. no question of general importance is certified.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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