Federal Court  Cour fédérale

Date: 20110811

Docket: IMM-26-11

Citation: 2011 FC 991

Ottawa, Ontario, August 11, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

CARLOS ANTONIO BARRIOS TRIGOSO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 6 December 2010 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a citizen of Peru. He fears returning to that country due to his involvement in political activity, which began in the mid-1980s when he was a university student. As a student, he attended demonstrations against the ruling party, the Accion Politica Revolucionaria de America (APRA) and became known among the Juventud Aprista (the Young APRAs) as "The Terrorist." In 1989, the Applicant joined the Cambio 90 party, which supported Alberto Fujimori's campaign for the Peruvian presidency. He frequently discussed politics with his customers and fellow merchants in the marketplace at Lima.

[3] After Fujimori was elected in 1990, the Applicant joined in "moralization" rallies against members of the former APRA government who were suspected of being corrupt. These people would be led from their homes and taken into custody by officers of the National Intelligence Service (Servicio de Intelligencia Nacional [SIN]), one of whom the Applicant recognized from his days in the Cambio 90 party.

[4] In 1991, the Applicant received an anonymous note threatening him with death. Because it referred to him as "The Terrorist," the Applicant concluded that it had been sent by the Young APRAs.

[5] In 1992, the Applicant came to oppose Fujimori's anti-union measures. He attended two demonstrations against the government where he recognized the same SIN officer whom he had seen at the moralization rallies. The Applicant claims that, in July 1992, while police were breaking

up an anti-government rally, he was attacked by the same SIN officer and another man in a suit, both of whom tried to force the Applicant to come with them before he escaped.

[6] In December 1994, two men identifying themselves as police officers approached the Applicant at his workplace in the market and told him that they had caught the person who had written the anonymous death threat in 1991. The Applicant claims that, when he refused to go to the police station, they started dragging him away but he escaped.

[7] In January 1995, the Applicant was approached by the same SIN officer, who ordered him to stop. The Applicant ran away in fear and, rather than return to his own home, went to live at his aunt's house.

[8] In May 1995, the Applicant traveled to the US. He remained there for more than 13 years without ever claiming asylum. He alleges that he did not know that he could do so until 1998, at which time he was advised by his lawyer that it was too late for him to make a claim. He also alleges that he applied for a work visa but received no reply. The Applicant applied for a Peruvian passport in 2006. At that time, two strangers allegedly sought out the Applicant at his house in Peru, one by telephone and the other by personal visit.

[9] The Applicant has remained concerned that, if deported to Peru, he will be persecuted by APRA (which forms the current government) due to his past anti-APRA activities. He also fears being persecuted by SIN officers because he knows that they themselves were involved in anti-

APRA activities during the Fujimori administration. Fearing that he would be deported from the US, he came to Canada on 20 August 2008 and filed a refugee claim two days later.

[10] The Applicant appeared before the RPD on 1 November 2010. He was represented by counsel and an interpreter was present. The RPD refused his claim, having found that he was neither a Convention refugee under section 96 of the Act nor a person in need of protection under section 97. This is the Decision under review.

DECISION UNDER REVIEW

Nexus

[11] The RPD found that the determinative issue regarding the Applicant's section 96 claim is nexus. Although the Applicant alleged subjective fear of returning to Peru, his unsatisfactorily explained 13-year delay in claiming refugee status undermined his credibility and caused the RPD to draw a negative credibility inference with respect to subjective fear. Furthermore, he did not establish that his fear was objectively well-founded.

[12] The Applicant did not provide sufficient persuasive evidence to demonstrate that he was personally attacked during the July 1992 anti-government rally. Rather, it was more likely that he fell victim, along with the rest of the crowd, to the police attempts to the break up the protest.

[13] The RPD found that the Applicant's belief that the Young APRAs issued the anonymous death threat was speculation and also that the Applicant acted unreasonably in running away from

the police officers who approached him with the news that they had arrested the person responsible. Similarly, the Applicant did not provide a reasonable explanation for running away from the SIN officer who approached him in January 1995, as there was no persuasive evidence to suggest that the officer intended to harm him or to act in any capacity except an official one.

[14] With respect to the Applicant's forward-looking risk, the RPD found that there was no persuasive evidence that the SIN or APRA would be interested in or target the Applicant if he were to return to Peru today. There is no reasonable explanation for the Applicant's fear. He has been out of the country for 15 years. The SIN was abolished in 2004, and there is no persuasive evidence that its successor body has any intention of harming the Applicant. While the political climate at the time of the Applicant's flight from Peru was turbulent, there is no persuasive evidence that his past opposition to the Fujimori administration would make him a target, particularly considering that the Fujimori administration is repudiated in Peru today. Moreover, in 2009 there were no reported politically motivated killings, disappearances or tortures in the Applicant's home country and specific instances of past abuses are not widespread. In addition, there is no evidence to support the Applicant's belief that the two people who sought him out at his house in Peru in 2006 intended anything more than to complete a background check for his Peruvian passport application.

Section 97 Risks

[15] The RPD found that the Applicant failed to establish a "specific, individualized risk of harm" with respect to his section 97 claim.

ISSUES

[16] The Applicant raises the following issues:

a. Whether the RPD erred in its findings of fact and credibility or in its treatment of the evidence;

b. Whether the RPD conducted a proper section 97 analysis; and

c. Whether the RPD breached the duty of fairness by failing to provide an adequate recording of the hearing.

STATUTORY PROVISIONS

[17] The following provisions of the Act are applicable in these proceedings:

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	*b*) soit, si elle n'a pas de nationalité et se trouve hors du

country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

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

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

Personne à protéger

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 Article 1 of the Convention Against Torture; or

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

STANDARD OF REVIEW

[18] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[19] The first issue concerns the RPD's findings of fact and credibility and its treatment of the evidence, matters in which the tribunal has recognized expertise. The appropriate standard of review

is reasonableness. See *Dunsmuir*, above, at paragraphs 51 and 53; and *Ched v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1338 at paragraph 11.

[20] The second issue challenges the RPD's section 97 analysis, which is a question of mixed fact and law. The appropriate standard of review is reasonableness. See *Saint Hilaire v Canada (Minister of Citizenship and Immigration)*, 2010 FC 178 at paragraph 12.

[21] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[22] The third issue challenges the adequacy of the recording and, consequently, the fairness of the hearing before the RPD. Procedural fairness questions are reviewable on a standard of correctness. See *Toledo v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1572 at paragraphs 2-6; and *Dunsmuir*, above.

ARGUMENTS

The Applicant

[23] The Applicant observes that a "significant portion" of counsel's questioning regarding the objective basis of the Applicant's fear and his failure to claim asylum in the US is inaudible on the recording of the hearing. Given that lack of an objective was material to the RPD's rejection of the Applicant's claim, the unavailability of a complete transcript constitutes a breach of natural justice.

[24] The Applicant asserts that the RPD made no general credibility finding against him and so must be assumed to have accepted all of his evidence as true. However, it is obvious that the RPD did not accept the Applicant's explanations with respect to the following incidents: the July 1992 attack on him by two men during the anti-government rally; the December 1994 attack on him by the two men who identified themselves as police officers; the January 1995 encounter with the SIN official; the two attempts by unidentified persons to contact the Applicant at his home in Peru in 2006. In each instance, the RPD found that the Applicant's perception of the incident as a threat or a personal attack was unreasonable. It "sanitized" the Applicant's version of events to better suit its own unreasonable inferences and erroneous plausibility findings, and it failed to explain its reasons for doing so in clear and unmistakable terms. This, in the Applicant's view, constitutes a violation of the principles of natural justice.

[25] Furthermore, the RPD ignored or misapprehended documentary evidence from 1997 which detailed Peru's human rights abuses and which was supportive of the Applicant's belief that these incidents were of a threatening nature. As this Court held in *Cepeda-Gutierrez v Canada (Minister*

of Citizenship and Immigration) (1998), 157 FTR 35, [1998] FCJ No 1425 at paragraph 17, the more relevant and important the evidence, particularly contradictory evidence, that is not mentioned by the tribunal the more willing a court may be to assume that the tribunal erred in its findings of fact.

[26] The Applicant also challenges the RPD's treatment of his reasons for failing to make a refugee claim sooner. The RPD failed to acknowledge in its Decision that the Applicant did apply for a work visa in the US but received no response to his application. Moreover, his ignorance of how the asylum system works should be believed, especially considering that the RPD did not find him to be generally lacking in credibility. As the Federal Court of Appeal stated in *Shanmugarajah v Canada (Minister of Employment and Immigration)* (1992), 34 ACWS (3d) 828, [1992] FCJ No 583 (QL) at paragraph 3: "[I]t is almost always foolhardy for a Board in a refugee case, where there is no general issue as to credibility, to make the assertion that the claimants had no subjective element in their fear …."

[27] With respect to his section 97 claim, the Applicant contends that there is uncontroverted evidence that he will be at risk due to his past political activities if returned to Peru. The state is "actively permissive" of human rights violations and corruption and protective of corrupt public officials. Opponents of the state are under attack. The judiciary is politicized and corrupt. The RPD's failure to make a general negative credibility finding means that all of the Applicant's evidence should be accepted as truthful. Even if the RPD had not accepted the Applicant's claims, having accepted his identity it was required to undertake a meaningful section 97 analysis. In failing to do so, it committed a reviewable error.

The Respondent

[28] The Applicant argues that the RPD failed to provide an adequate recording of the hearing but has filed no supporting evidence, without which there can be no finding. In addition, if credibility is not in issue, a transcript is not necessarily determinative of the matter.

[29] The Respondent argues that refugee protection is surrogate protection and claims for refugee protection are forward-looking. While evidence of past persecution may support a well-founded fear of persecution in the future, it is evidence of well-founded fear of that will occur in the future that is critical. The RPD acted reasonably in finding that there was no persuasive evidence to indicate that the current government of Peru would be interested in targeting the Applicant more than 15 years after he first fled the country.

[30] Although the Applicant argues that it is unreasonable to expect claimants who are ignorant of the asylum system to apply for protection, the jurisprudence is clear that delay is relevant to the tribunal's assessment of subjective fear.

[31] The Respondent argues that the RPD's section 97 analysis was reasonable. The onus was on the Applicant to adduce sufficient evidence to establish a prospective and personalized risk of harm upon his return. In the RPD's view, however, the Applicant failed to provide any evidence to this effect.

The Applicant's Reply

[32] In response to the Respondent's assertion that the Applicant did not adduce evidence regarding the deficiencies of the recording of the hearing, the Applicant submits that he has provided a sworn affidavit in which he states that important portions of the recording were inaudible.

The Respondent's Further Memorandum

[33] The Respondent submits that a review of the Certified Tribunal Record demonstrates that the "vast majority" of the questions asked of the Applicant were audible and the Applicant's evidence is clear. At the end of the hearing, the RPD gave permission for Applicant's counsel to provide written submissions, which she did and which the RPD considered. Any gaps in the transcript must be shown to raise a serious possibility that the Applicant was denied a ground of appeal or review. See *Canada (Minister of Citizenship and Immigration) v Liang*, 2009 FC 955. The Respondent contends that there has been no prejudice in this case.

[34] The Applicant challenges the RPD's finding that he was not personally targeted in Peru but provided no corroborating evidence that he was so targeted. The presumption that a claimant's sworn testimony is true can be rebutted by a failure to produce corroborating evidence. The RPD recognized that, according to the documentary evidence, Peru has a democratically elected government and there have been no reports of politically-motivated killings, kidnappings or torture.

The Applicant's position amounts to disagreement with the manner in which the RPD weighed the evidence, which affords no legal basis for the Court's intervention.

ANALYSIS

[35] The RPD makes no credibility findings. The gist of the Decision is that the Applicant provided insufficient evidence to establish a well-founded fear of returning to Peru.

[36] As regards the Applicant's own past experiences, the RPD found that there was insufficient evidence to establish past targeting and, given the present documentary package on Peru, there were no reasonable grounds to expect prospective risk.

[37] The Applicant has attempted to attack the RPD's findings on past targeting as being disguised credibility and plausibility findings that have no evidentiary basis and which overlook the available evidence on point. However, my reading of the Decision and the transcript convinces me that this is not the case. The RPD did not disbelieve that the events occurred; it simply could not accept the interpretations and assumptions that the Applicant had placed upon those events. The Applicant himself testified that he had no real basis for those interpretations apart from his own fear.

[38] When he was asked why he thought he was being targeted in 1992 his answer was "I'm not sure why, but possibly they identified me." When he was asked why he ran away from a security intelligence officer in 1995 and whether the officer was trying to kidnap him or take him to the

police station he said “I'm not sure.” His explanation as to why he would not go with the two policemen in 1994 was equally inconclusive.

[39] When he was asked why APRA and the present National Intelligence Services would target him after 15 years, his answer was: “They never told me. I'm not sure, but probably because of the information they think I have.”

[40] The Applicant says in his testimony “I am afraid, the fear is real.” But it is clear that he could not offer anything persuasive from his own experiences to justify that fear. The documentation also provided little in the way of support for his fears. The Applicant has referred the Court to documentation emanating from 1997, but the RPD examined the current country documentation which showed that, despite past problems, there was no persuasive evidence that if the Applicant were returned to Peru today, he would be targeted by the current administration or its agents. Any fears the Applicant might have regarding the current government of Peru or of members of SIN were speculative.

[41] This is the heart of the Decision. The Applicant raises other points but, even if the Court were to accept them, they would not be determinative. The Applicant has withdrawn any complaints he had regarding the adequacy of the record. Given the lack of persuasive evidence on any personalized risk, the RPD’s section 97 analysis was reasonable.

[42] I can find no reviewable error with the Decision. Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-26-11
STYLE OF CAUSE:	**CARLOS ANTONIO BARRIOS TRIGOSO** **and** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
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