Federal Court  Cour fédérale

Date: 20111121

Docket: IMM-103-11

Citation: 2011 FC 1334

Ottawa, Ontario, November 21, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

MARCO ANTONIO MONTESINOS HIDALGO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (hereafter IRPA) of the decision made on September 20, 2010, by a Pre-Removal Risk Assessment ("PRRA") Officer, rejecting the applicant's PRRA application.

[2] For the reasons expressed below, I find that the applicant was denied procedural fairness. The application for judicial review will, therefore, be granted.

BACKGROUND

[3] The applicant is a 31 year old citizen of Mexico. He studied law and in 2003 became the owner of a video store in Tapachula Chiapas. In December 2006 he was approached by members of the gang Mara 18 to use his store to sell drugs. He refused. He was subsequently beaten at his store in January 2007. He reported the incident to the police.

[4] Upon following up on the status of the investigation in March 2007, the applicant came to believe that one of the policemen he had reported the matter to was in league with the gang. The applicant was than beaten again. He went to the hospital and, while recuperating, his store burned down.

[5] The applicant consequently moved to Tuxtla Guetierrez Chiapas and filed another complaint. He was advised that the police officer he suspected would be investigated. In September 2007, the applicant received a phone call telling him that if he identified someone during the investigation he would be killed. The applicant came to Canada in November 2007 and made a claim for refugee protection.

[6] The Refugee Protection Division (“RPD”) of the Immigration and Refugee Board determined that the applicant was not a Convention refugee or a person in need of protection. Credibility and state protection were the determinative issues. On the advice of new counsel, the applicant sought to submit additional documentary evidence following the hearing. That request was denied. An application for leave and for judicial review of the RPD decision was dismissed.

[7] The applicant made a PRRA application in August 2009. The application was rejected in October 2009. Leave for judicial review of that decision was granted but the application was withdrawn by the applicant after the Minister agreed to have the matter reexamined by another officer. On the redetermination, the assessment was again that the applicant faced less than a mere possibility of persecution and that there was no ground to believe that he faced a danger of torture or of a risk to his life, or cruel and unusual treatment or punishment.

DECISION UNDER REVIEW:

[8] The officer was not satisfied that the additional evidence submitted by the applicant changed the material facts of his claim or overcame the RPD finding on state protection. Applying s.113(a) of the IRPA, the officer found that no consideration should be given to the evidence as it was available to the applicant before his RPD hearing.

[9] The applicant also submitted additional documentary evidence respecting country conditions in Mexico. The officer found that although the conditions in Mexico are less than ideal, referring to the drug cartels and gang problems, the applicant did not prove that he faced a personalized risk in his country. The officer concluded that the applicant, therefore, did not overcome the presumption of state protection.

ISSUES

[10] The issues raised in this application are whether the officer erred in failing to address the applicant's request for an oral hearing and in failing to hold such a hearing.

STANDARD OF REVIEW

[11] The Federal Court is authorized to intervene when a tribunal has failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe: paragraph 118.1(4)(b) *Federal Courts Act*, RS C, c F-7. The standard of review for this application of this authority has been described as correctness: *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 43; and *Sivabalasuntharampillai v Canada (Minister of Citizenship and Immigration)*, 2011 FC 975 at para 19. As was also stated in *Khosa*, at paragraph 43, relief may be withheld when the procedural error is purely technical and occasions no substantial wrong or miscarriage of justice.

ANALYSIS

[12] The applicant submits that he requested that an oral hearing be held pursuant to s.113(b) of the IRPA if the officer had concerns regarding his credibility. He contends that he was denied procedural fairness by the officer's failure to grant a hearing and failure to provide reasons to explain why a hearing was not necessary.

[13] Section 113(b) of the IRPA provides that in considering an application for protection a hearing may be held if the Minister, on the basis of the prescribed factors, is of the opinion that a hearing is required.

[14] Section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (hereafter the Regulations) sets out the prescribed factors as follows:

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.

[15] The criteria in s.167 are cumulative: *Tran v Canada (Minister of Public Safety and Emergency Preparedness*, 2010 FC 175; *Ventura v Canada (Minister of Citizenship and Immigration)*, 2010 FC 871; *Matano v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1290.

[16] The criteria have been interpreted by the Court as requiring, first, a question as to the applicant's credibility and second, that this credibility finding is determinative to the case. As stated by Justice Bédard in *Matute Andrade v Canada (Minister of Citizenship and Immigration)* 2010 FC 1074 at paragraph 31, the Court needs to look “beyond the words” to determine whether credibility was actually in issue.

[17] Here, the applicant submits that the issue of state protection was intertwined with his credibility. If his story was found to be truthful, the officer’s state protection finding may have been different. Thus he was entitled to a hearing and an opportunity to persuade the officer to accept the evidence that would have corroborated his story.

[18] The respondent argues that the PRRA officer properly rejected the new evidence in accordance with s.113(a) IRPA and the jurisprudence: *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385. This extinguished all issues regarding credibility.

[19] I agree with the respondent that an oral hearing may have ultimately served no purpose since the applicant’s object in requesting a hearing was to persuade the officer to accept his new evidence. In that regard, the officer’s finding that the new evidence was not admissible may well have ended the matter, as the respondent contends. However, that reasoning does not appear in the officer’s decision.

[20] In my view, the officer's reasons are open to the interpretation that he did not believe the applicant and that credibility was, therefore, in issue. In those circumstances, the weight of the jurisprudence in this Court is to the effect that an officer must provide reasons as to why he/she refuses a request for an oral hearing. See *Zemo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 800 at para 18; *Zokai v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1103 at para 12; and *Rana v Canada (Minister of Citizenship and Immigration)*, 2010 FC 36 at para 40.

[21] In this case, the officer checked off a box besides a "no" under the headline "oral hearing" on the form used to structure PRRA decisions but gave no reasons to explain why a hearing was not necessary. Apart from the check box, there is no indication that the officer turned his mind to the issue. In my view, this falls short of constituting adequate reasons.

[22] Since the officer did not provide any reasons as to why an oral hearing was not necessary, the Court cannot assess the reasonableness of his decision to not grant the requested hearing. The respondent's argument that this followed inevitably from the decision to exclude the new evidence may be correct but does not fill the void in the officer's reasons.

[23] In the result, I find that the failure to provide adequate reasons for the decision not to hold a hearing constitutes a breach of procedural fairness and will send the matter back for reconsideration.

[24] No questions were submitted for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the matter is remitted for redetermination by a different pre-removal risk assessment officer in accordance with these reasons.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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