Federal Court Cour fédérale

Date: 20120410

Docket: IMM-7145-11

Citation: 2012 FC 401

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 10, 2012

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

WALTER ERNESTO GUZMAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) of a decision of a Pre-Removal Risk Assessment (PRRA) officer in which he determined that the applicant would not be subject to a risk to his life, a risk of cruel or unusual treatment or punishment, or a risk of torture if he were to return to El Salvador.

FACTS

[2] The applicant, a citizen of El Salvador, arrived in Canada on April 7, 1988. He obtained permanent residence in March 1992 through the special “Backlog Clearance Program”.

[3] In 1995 he was convicted of robbery and assault. Two years later, in 1997, he was convicted of breaking and entering and conspiracy. In 2005, he was convicted of assault and uttering threats; and three years after that, he was convicted on two counts of conspiracy and possession for the purpose of trafficking crack, cocaine and methamphetamines. He was subsequently sentenced to serve a term of two years’ imprisonment and two years’ probation concurrently.

[4] On June 19, 2009, the applicant was ordered deported for serious criminality. On April 7, 2011, the Immigration Appeal Division dismissed his appeal against the deportation order.

[5] On June 7, 2011, the applicant failed to appear for a meeting with the Canada Border Services Agency (CBSA) and a warrant for his arrest was issued. On August 18, 2011, he saw a wanted notice identifying him as one of the CBSA’s most wanted criminals. The next day he turned himself in to the police and was placed in custody by the CBSA.

[6] On September 16, 2011, he filed a PRRA application, but this was dismissed on October 4, 2011. His removal to El Salvador was scheduled for October 20, 2011.

[7] On October 14, 2011, the applicant filed the present application for judicial review of the PRRA officer's decision. The day before his removal, this Court granted him a stay of the removal order pending the outcome of his application for judicial review.

THE PRRA OFFICER'S DECISION

[8] The officer noted that the applicant submitted a PRRA application on the ground that he would face a risk of arrest, arbitrary imprisonment and torture by reason of his criminal history and his tattoo similar to that of the Maras, a criminal organization in El Salvador.

[9] He emphasized that refugee protection can only be granted under subsection 97(1) of the IRPA, as is set out at subsection 112(3) of this Act. The officer then examined whether there were serious grounds to believe that the applicant would be subjected to torture or if, on the preponderance of the evidence, he would face a risk to his life or a risk of cruel and unusual treatment or punishment.

[10] Although the officer acknowledged the arbitrary arrests and acts of torture that have been committed by the police authorities under the "Super Mano Dura" policy targeting the Maras, as indicated in the documentary evidence, and the fact that such problems continue to exist in El Salvador, he maintained that the situation had changed since this new law came into effect. Now, the authorities focus their efforts on conducting thorough investigations rather than proceeding with [TRANSLATION] "massive gang sweeps". As for the U.S. Court of Appeal's decision submitted by the applicant, the officer stated that he was not bound by U. S. court decisions and that he preferred

to rely on more recent, objective documents to grasp the current state of affairs in El Salvador. In light of these changes, the officer was of the view that it was not more likely than not that the applicant would be placed in detention, where most acts of torture occur.

[11] With respect to the applicant's tattoos, the officer agreed that these might draw the attention of the authorities due to the fact that such tattoos have historically been linked to the Maras. However, he believed that the tattoos, in and of themselves, were not sufficient to establish, on the preponderance of the evidence, that the applicant would be arrested and detained on suspicion of being a member of the Maras. Moreover, the officer noted that the average age of members of the Maras is 20, whereas the applicant is nearly 34 years old.

[12] Lastly, the officer noted that, unlike the U.S. authorities, the documentation does not show that Canadian authorities disclose the criminal histories of individuals they remove to El Salvador. He therefore could not conclude, on the preponderance of the evidence, that the applicant would be identified as having a criminal history upon his arrival in El Salvador. However, the officer did acknowledge that there was a possibility that the applicant, who has been away from El Salvador since he was a child and has visible tattoos, might encounter some reintegration problems upon his return.

1. Did the PRRA officer err in law by applying the wrong test under section 97 of the IRPA?

[13] On one hand, the applicant claims that the officer applied the wrong standard of proof in his assessment of risk under section 97 of the IRPA. In particular, the use of the words [TRANSLATION]

"not more likely than not" means that the officer thought that there was a 50 percent risk that he would be arrested and subjected to acts of torture. Given that the risk was assessed at 50 percent, the officer should therefore have concluded that the applicant had discharged his burden of proof, since the balance of probabilities standard of proof had been met.

[14] On the other hand, the respondent submits that the applicable standard of proof under section 97 of the IRPA is that of the balance of probabilities: *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, 329 NR 346. When he employed the expression used in the case law, namely, "more likely than not", the officer was not stating that the applicant had established his level of risk at 50 percent. He was merely stating that the applicant had not discharged his burden. I am of this view for the following reasons.

[15] In *Li*, above, the Court of Appeal clearly established that the standard of proof for the purposes of section 97 is proof on a balance of probabilities. The wording used by the officer at certain points in his decision should perhaps have been clearer and less ambiguous. But various excerpts from the officer's reasons show that he was aware of the applicable standard of proof under 97 of the IRPA, and that he applied that standard in this case. For example, at page 7 of his reasons, the officer writes: [TRANSLATION] "I am of the opinion that the applicant's tattoos are not sufficient , in and of themselves, to establish, on the preponderance of evidence, that he would be arrested and detained for being a member of an illegal group". Then, at page 8 of his reasons, the officer concludes [TRANSLATION] "that it is unlikely that the applicant would be arrested and detained for being a member of an illegal group". Later, at the same page, the officer opines

[TRANSLATION] “that it is unlikely that he would be treated or stigmatized in the same way as the gang members deported from the United States and described in the report”.

[16] The argument is unfounded.

2. Was the PRRA officer’s decision reasonable in light of the evidence?

[17] The applicant’s main argument is that the officer failed to examine all of the evidence adduced, and disregarded a number of pieces of evidence that contradicted his finding with respect to the application of the new law and the scope of the changes brought about by this law.

[18] I share this view, for the following reasons.

[19] It is well established in the case law that when a decision maker is silent on evidence in the record, and that this evidence contradicts his or her finding, it may be easier to infer that the decision maker overlooked the contradictory evidence: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, [1998] FCJ No 1425 (QL).

[20] To begin with, the applicant had told the officer that the CBSA had posted his photo [TRANSLATION] “on its site and all over the Canadian media”, as a most wanted criminal. This information in itself refutes the officer’s finding that Canadain authorities do not disclose the criminal histories of individuals they remove to El Salvador, and that the applicant’s criminal history would not subject him to any particular risk in El Salvador. It may well be the case that Canadian authorities do not share the reason for the removal with foreign authorities, but

circumstances in this case certainly increase the likelihood that the Salvadoran government would be aware of the applicant's criminal past, especially given the fact that his face was posted all over the Internet and in newspapers across Canada. At any rate, the officer did not address this issue in his analysis.

[21] Furthermore, the officer stated that there was nothing in the documentary evidence adduced by the applicant which showed that the Salvadoran authorities were returning to their old practices from the "Super Mano Dura" era. In particular, he writes:

> [TRANSLATION]
>
> Despite the concerns expressed about the implementation of this new antigang law, the documentation I consulted, which is objective and accessible to the public, and the documentation provided by the applicant do not contradict the fact that arrests and detentions of *mararos* are now conducted after investigations and surveillance of suspects… In the absence of evidence showing otherwise, I find that the Salvadoran authorities now favour investigation and surveillance of suspects…

However, the document "Freedom in the World 2011 – El Salvador", from June 17, 2011, expresses doubts as to the state of affairs in El Salvador since the new antigang law came into force. One of the relevant passages reveals that:

> The previous ARENA governments, like others in Central America, used *mano dura* (firm hand) tactics to combat gang violence, including house-to-house sweeps by police and military. However, judges often refused to approve warrants for such wide searches. Unofficial death squads and vigilantes, allegedly linked to the police and army, have also emerged to combat gangs with extrajudicial killings. In November 2009, Funes authorized a six-month deployment of troops to high-crime communities to address public security issues. In May 2010, Funes extended the program – which granted the military greater power to conduct patrols and searches among civilians – for an additional year, signaling a return to ARENA-style *mano dura* practices. In an attempt to halt the

> development of organized crime in the penitentiary system, the military was also granted permission to patrol inside the country's prisons.

[22] According to the document "2010 Human Rights Report: El Salvador", published by the U.S. State Departement:

> The PNC is responsible for maintaining public security and the Ministry of Defense for maintaining national security. President Funes authorized the military to provide temporary support of indefinite duration for PNC patrols in rural and urban areas and gave support to law enforcement agencies for specific activities, including antinarcotics and antigang efforts. The Ministry of Public Security headed the antigang task force. In 2009 military personnel were deployed to join the police on patrols and antigang and other task forces, and in May military personnel were assigned to assist in guarding the prison system. As of December 3,676 military personnel were assigned to assist the PNC, 1,553 to the Prison Authority, and 694 to the border patrol. Military personnel do not have arrest authority. The government has not indicated a concluding date for the temporary assignment of the military to police duties.

[23] In *Anand v Canada (Minister of Citizenship and Immigration)*, 2007 FC 234, [2007] FCJ No 298 (QL), Justice de Montigny explained that unless clear evidence is provided to the contrary, an administrative decision-maker is deemed to have considered all of the evidence in a file. Decision-makers have no obligation to refer to every piece of evidence they take into account before making their decision, nor do they have to distinguish the evidence on which they rely from the other evidence in the record.

[24] In this case, the excerpts cited above clearly constitute evidence that contradicts the officer's finding and he had an obligation to discuss that evidence in his decision. It is worth reproducing the Court's words in *Cepeda-Gutierrez*, above:

> 17 However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard for the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[25] Lastly, I also note the response to requests for information SLV101080.F, dated April 7, 2006, according to which members of the Maras are in fact between 11 and 40 years old. This document, which the officer overlooked, contradicts his finding that the applicant, who is 33 years old, would be too old for the typical demographic of the Maras. Although youths are specifically targeted for recruitment by the Maras, there is nothing in the document that would exclude the applicant's age group.

[26] For these reasons, the application for judicial review is allowed and the matter is referred back to another decision-maker for redetermination.

JUDGMENT

THE COURT ORDERS THAT:

1. The application for judicial review is allowed. The matter is referred back to another decision-maker for redetermination.
2. No question is certified.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Marie-Pierre Labbé	**FOR THE APPLICANT**
Sébastien Dasylva	**FOR THE RESPONDENT**

SOLICITORS OF REORD:

Marie-Pierre Labbé 249 St-Jacques, Suite 300 Montréal, Quebec H2Y 1M6	**FOR THE APPLICANT**
Sébastien Dasylva Myles J. Kirvan Deputy Attorney General of Canada Montréal, Quebec	**FOR THE RESPONDENT**