Federal Court  Cour fédérale

Date: 20130926

Docket: IMM-1811-13

Citation: 2013 FC 987

Ottawa, Ontario, this 26th day of September 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

DANIEL ALEJANDRO LOZANO LOPEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Daniel Alejandro Lozano Lopez, seeks judicial review of the decision of a Senior Immigration Officer (the "officer"), dated January 28, 2013, rejecting his Pre-Removal Risk Assessment ("PRRA") application. His judicial review application is made pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "Act").

[2] The applicant entered Canada on January 7, 2008. He claimed refugee protection one week later. However, he cannot claim refugee protection because he has been found to be inadmissible by the Immigration Division of the Immigration and Refugee Board of Canada for "being a member of an organization that there are reasonable grounds to believe engaged in terrorism". Paragraph 34(1)(*f*) of the Act reads:

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	**34.** (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
(*f*) for being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraphs (*a*), (*b*) or (*c*).	*f*) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas *a*), *b*) ou *c*).

[3] In this particular case, the acts referred to are with respect to paragraph 34(1)(*c*), "engaging in terrorism".

[4] As a result of the application of subsection 112(3) of the Act, refugee protection was denied and a deportation order was issued. Thus, the PRRA application was based on an allegation that the applicant would be subject to danger of torture, risk to life or risk of cruel and unusual treatment or punishment if he returned to his country.

[5] In essence, the applicant claims that the reasons for which he is inadmissible as a refugee is the reason why he should not be returned to his country of origin. In my view, his application cannot succeed.

The facts

[6] The applicant is a Colombian citizen. As indicated earlier, he came to Canada in January of 2008. The applicant claimed that he is afraid of the members of the *Autodefensas Unidas de Columbia* [AUC] because he was once associated with that paramilitary organization.

[7] He would have joined the Colombian Army in March 1995, where he served until October 1999. In the months that followed, he joined the AUC. He claims that he limited his activities to information gathering where he was then located.

[8] It appears that the AUC was involved in illegal activities, including the smuggling of heroin and other drugs to countries such as Spain. The applicant would have helped the AUC in finding people who would be willing to smuggle drugs into Spain.

[9] The applicant states that, towards the end of 2000, the Colombian Army discovered that he was no longer officially in the military.

[10] In spite of pressures exerted by members of the AUC for the applicant to take part in what is described as "social cleansing efforts", the applicant resisted. Thus, in December 2001, the applicant is claiming that he left the AUC and returned to his hometown of Santa Rosa.

[11] Within a month, people in his neighbourhood warned the applicant that men in white trucks were looking for him. The applicant left Santa Rosa and travelled to an area on the Atlantic Coast of

Colombia. There, he changed his appearance and started selling jewellery, in the hope of avoiding detection and living safely in Colombia.

[12] He claims that he was able to live safely for about five years. However, he would have been confronted in December of 2006 by two men on motorcycles in the public market of Cartagena. For some reason, the applicant recognized these men as being paramilitaries. A second encounter occurred three days later, this time with four men on two motorcycles. Of the four men, two were the individuals who had confronted him three days earlier.

[13] As he feared for his life, the applicant would have told the group of four that "their boss knew the Applicant" (paragraph 22 of the Applicant's Memorandum of Fact and Law). They would have indicated to the applicant that they were going to investigate him and that they would get back to him. The applicant decided that he had to flee Colombia.

[14] Instead of seeking protection from the authorities, the applicant chose to leave the area where he had been living for five years and went to Monterria and Medellin. In Medellin, a cousin indicated to him that money would be made available in order to flee Colombia and travel to the United States.

[15] The applicant obtained a US visa and he travelled by air to Miami on September 3, 2007. The applicant then went to Buffalo, in the state of New York, where he tried to cross into Canada by swimming. I reproduce in their entirety the following paragraphs of the Applicant's Memorandum of Fact and Law:

> [29] In July 2007, the Applicant returned to his parents' home in Santa Rosa, and on September 3, 2007 the Applicant travelled by air to Miami. The Applicant then went to Buffalo, New York, where he tried to cross into Canada by swimming, but the water was too cold and there were two helicopters flying over the area. The Applicant met a fellow from Honduras and together they travelled to Seattle, Washington.
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> [30] The Applicant did not claim asylum in the US because he does not trust the US government and believes the US is funding and supporting terrorists in Colombia, including the paramilitaries. The Applicant also feared that if he sought asylum in the US, they would return him to Colombia.

Arguments

[16] The applicant challenges the decision of the PRRA officer on the basis that it is based entirely on state protection and that it was wrong to have concluded that the applicant had not rebutted the presumption of state protection.

[17] The officer is faulted for not having reviewed documentary evidence presented by the applicant to the effect that the state of Colombia is not able to curtail the serious violence committed by paramilitaries. The applicant points to some evidence indicating that the AUC, and groups of that nature, have the capacity to pursue victims throughout the country, including those who have spent many years outside of the country.

[18] The applicant contends that, although the decision-maker does not have to refer to each and every piece of evidence, important and relevant evidence directly relevant to the findings cannot be ignored.

[19] The respondent argues in return that the presumption of state protection has not been rebutted. Indeed, in this case, the applicant did not even seek that protection, claiming that the state would not be willing or able to protect him. In the view of the respondent, there is nothing in the argument put forward by the applicant that points to the unwillingness of the state to assist ex-AUC members. Actually, the evidence goes in the other direction. Since the presumption can only be overcome by clear and convincing evidence of a state's inability to protect, the application must fail. The burden on the applicant was to establish reliable and convincing evidence which would satisfy the decision-maker that state protection is inadequate. Such has not been made in this case. The mere subjective belief in the inability of the authorities to protect is insufficient. As for the argument that the decision does not address some arguments, the respondent relies on *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, to counter that argument.

Standard of Review

[20] The parties agree that the judicial review of a PRRA officer's decision is to be conducted on the basis of a standard of review of reasonableness. I share that view.

Analysis

[21] The story as told by the applicant barely has an air of reality. It lacks in precision and some aspects of it seem to stretch credibility. For instance, the episode about swimming to Canada from Buffalo appears to be rather odd. Be that as it may, the PRRA decision is based on the ability of the state of Colombia to protect its citizens from the violence that could be exerted by paramilitary organizations, even to this day.

[22] While I agree with the argument that important and relevant evidence cannot be simply disregarded by a decision-maker without examination and analysis, it remains that there must be on the record that kind of evidence that was actually disregarded by the trier of fact. Here, we are faced with voluminous evidence that confirms that paramilitary organizations in Colombia are still active. So be it. Given the evidence, and the limited involvement that the applicant claims was his while associated with the AUC, the applicant falls well short of establishing that he cannot benefit from state protection on the basis of that evidence.

[23] It is not so much that evidence was disregarded. It is rather that the kind of relevant evidence which might convince was never presented to the decision-maker. As it is well known, the presumption of state protection can only be overcome by clear and convincing evidence. Thus, in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, one can read at page 709:

> . . . International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into place only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their own state for protection before the responsibility of other states becomes engaged.

[24] In *Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 FCR 636, the Federal Court of Appeal confirms that the evidence submitted by an applicant must be of a certain quality. It does not suffice that the evidence is relevant, or even reliable. It must convince:

> [30] In my respectful view, it is not sufficient that the evidence adduced be reliable. It must have probative value. For example, irrelevant evidence may be reliable, but it would be without probative value. The evidence must not only be reliable and

> probative, it must also have sufficient probative value to meet the applicable standard of proof. The evidence will have sufficient probative value if it convinces the trier of fact that the state protection is inadequate. In other words, a claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate.

[25] Evidence that points in the direction that paramilitary groups continue to be active in Colombia will not have the quality required. In his Memorandum of Fact and Law, the applicant refers to the evidence that, he claims, was unduly disregarded by the officer. With great respect, what the decision-maker had to consider was evidence of a different order if the applicant can hope to be successful.

[26] Evidence however voluminous it can be which merely tends to show that the state is not completely successful at curtailing serious violence committed by paramilitary groups would appear to remain largely inconclusive with respect to the issue at hand. What would have been much more relevant and convincing, for example, would have been evidence that these groups are systematically targeting former members, however small their role may have been many years ago. Connecting this kind of evidence, as opposed to generic evidence of criminality by former paramilitary organizations, together with that of the applicant who would have shown that he was effectively targeted in December 2006, and not merely two encounters with unknowns, would go some way towards making the case more compelling. Faced with this kind of evidence, one would have expected the trier of fact to explain further how state protection can still be adequate. Instead, the officer was told a story that is vague and generic, and stretches credibility, including the episode of December 2006.

[27] We do not have, in this case, the clear and convincing proof of the state's inability to protect. The activities of paramilitary groups do not logically lead to the conclusion that state protection would not be available to a former member of one of those organizations. The probative value of that kind of evidence, given the issue that needs to be decided, was simply insufficient.

[28] On the basis of two encounters which were, at best, ambiguous because it is not even clear that they involved AUC operatives looking for the applicant, the latter chose, a few months after these alleged incidents, to leave his country, go to the United States on a US visa and then come to Canada, having crisscrossed the continent. He claimed that, at the time, in 2007, he had a real belief that he could not avail himself of state protection. Six years later, he seems to be making the same assertion. I can only be in complete agreement with Justice Near, then of this Court, who wrote in *Ceban v Minister of Citizenship and Immigration*, 2012 FC 875:

> [18] This Court has stressed in the past that the subjective belief of applicants that they could not avail of themselves of state protection is insufficient. The test for whether state protection "might reasonably be forthcoming" is objective (see for example *Judge v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1089, [2004] FCJ no 1321 at para 13; *Castaneda v Canada (Minister of Citizenship and Immigration)*, 2010 FC 393, [2010] FCJ no 437 at para 26).
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> [19] The Board considered the Applicant's testimony but still found the degree of police involvement speculative. In light of the evidence presented, that conclusion was reasonable, even if the Applicant disagrees with the Board's overall assessment. Moreover, it is not a comment on the Applicant's credibility so much as a need to demonstrate an objective basis for his belief that the police would not protect him because they were directly involved with the trainers' match-fixing activities. The Applicant still had an obligation to approach the police and seek other avenues of protection thereby allowing the state an opportunity to respond (see *Castro v Canada (Minister of Citizenship and Immigration)*, 2006 FC 332, [2006] FCJ no 418 at paras 19-20). As an alternative, the Board also suggested

> that the Applicant could have done more to bring his concerns to the attention of officials in the sports Federation.

[29] I find that on the basis of the evidence that was presented to the officer, it was reasonable to come to the conclusion that he reached. He acknowledged the voluminous material offered by the applicant showing that paramilitary groups are guilty of violent and criminal activities. But that is not sufficient. On the facts of this case, it has not been established that the fear of persecution is well-founded in an objective sense. Furthermore, general assertion about the continuing activities of the AUC does not establish that adequate state protection will not be forthcoming. I would have thought that the documentary evidence tended clearly to show that the state of Colombia takes a special interest in cases such as that of the applicant, such that it is not objectively reasonable for the applicant not to have sought the protection of his home authorities.

[30] The conclusion that there was no clear and convincing evidence to support a conclusion that Colombia is unable to adequately protect people like the applicant is reasonable and the judicial review application must be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review of the decision of a Senior Immigration Officer, dated January 28, 2013, rejecting the applicant's Pre-Removal Risk Assessment application, is dismissed. The parties did not submit that a question ought to be certified pursuant to paragraph 74(*d*) of the Act, and none arises.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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