Federal Court Cour fédérale

Date: 20160304

Docket: IMM-3385-15

Citation: 2016 FC 283

Ottawa, Ontario, March 4, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

RICARDO ST. AUBYN HOO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review of a negative decision by a Pre-Removal Risk Assessment officer ("PRRA Officer" or "Officer") dated May 29, 2015. The PRRA Officer determined that the Applicant would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to his country of nationality of residence.

Background

[2] The Applicant is a Jamaican citizen. He claims that in 1990 he became a permanent resident of the United States ("US") but in 2008 he was deported to Jamaica because of drug-related convictions. While he was living in the US he met Denis McKinley ("McKinley"), who was similarly deported to Jamaica at a later date. Between July 2008 and July 2009 the Applicant lived in Jamaica and claims that during that time, when he refused to join the Blood gang, he was beaten and shot at. When he reported this to the police, they told him to run for his safety.

[3] The Applicant entered Canada in 2009. On February 2, 2012 the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada found that he was excluded from refugee protection pursuant to Article 1E of the *Convention Relating to the Status of Refugees* ("Convention") because he failed to adduce evidence that he could not return to the US as one of its permanent residents. In the alternative, the RPD found that that the Applicant was not a Convention refugee pursuant to s 96 of the *Immigration and Refugee Protection Act,* SC 2001, c 27 ("IRPA") because there was no nexus to any Convention ground. Nor was he a person in need of protection pursuant to s 97 of the IRPA because the risks he faced were generalized in nature.

[4] The Applicant then applied for a determination that he was rehabilitated under s 36(3)(c) of the IRPA which was refused. His spousal sponsorship application was refused on the basis of his criminal inadmissibility. His application for judicial review of the rehabilitation decision was

dismissed in December 2015. The Applicant applied for a PRRA in March 2015, in support of which he filed an undated letter from a friend in Jamaica stating that McKinley believed that the Applicant was a police informant and had threatened to kill the Applicant if he returned to Jamaica. The PRRA was rejected in May 2015. The Applicant sought leave and judicial review of the PRRA Officer's decision and a stay of his removal pending its final determination, the stay was granted on August 14, 2015.

Decision Under Review

[5] The PRRA Officer first found that, because of his convictions in the US, the Applicant was inadmissible to Canada due to serious criminality as described in s 36(1)(b) of the IRPA. Accordingly, pursuant to s 112(3)(b), his application for protection was restricted to the grounds found in s 97 of the IRPA. The PRRA Officer then noted that the Applicant claimed that he faced a risk to his life in Jamaica. The Officer stated that he or she had reviewed the evidence and the RPD's reasons for rejecting the Applicant's refugee claim. The PRRA Officer found that the evidence in the record demonstrated that gang violence and crime is widespread in Jamaica. The Officer also referred to the submission by the Applicant's counsel stating that the Applicant's problems with a gang before leaving Jamaica, and the recent threat from McKinley, increased the Applicant's fear for his safety in Jamaica. However, the PRRA Officer determined that a risk of gang violence in Jamaica is a generalized risk faced by all individuals in that country and that there was insufficient objective evidence before him or her to conclude that the Applicant would be personally targeted. And, while the documentary evidence indicated that there are problems in Jamaica with respect to policing, it did not support a conclusion that police protection would not be available to the Applicant should he require it. Accordingly, the

Applicant had not rebutted the presumption of state protection with clear and convincing evidence. On this basis, the PRRA Officer found that the Applicant is not a person in need of protection under s 97 of the IRPA if he were removed to the US or Jamaica.

Issues

[6] The Applicant submits that there are two issues:

i. Whether the PRRA Officer applied the wrong test and/or ignored evidence, and

ii. Whether the decision is unreasonable.

[7] In my view, the sole issue is whether the decision was reasonable.

Standard of Review

[8] Although neither party specifically addresses standard of review, both apply the reasonableness standard in their submissions. In my view, reasonableness is the standard to be applied as demonstrated by prior jurisprudence reviewing PRRA officers' assessment of the risk, including whether it is individualized and whether the presumption of state protection has been rebutted (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]; *Correa v Canada (Citizenship and Immigration)*, 2014 FC 252 at para 19; *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678 at para 18 [*Portillo*]; *Lozano Navarro v Canada (Citizenship and Immigration)*, 2011 FC 768 at paras 15 and 16; *Gulyas v Canada (Citizenship and Immigration)*, 2013 FC 254 at para 37).

[9] In applying the standard of reasonableness, the Court will be concerned with the justification, transparency and intelligibility of the decision-making process and also with whether the decision falls within a range of possible, acceptable outcomes in respect of the facts and the law (*Dunsmuir* at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

Positions of the Parties

Applicant's Submissions

[10] The Applicant submits that the PRRA Officer erred by failing to refer to the undated letter from the Applicant's friend in Jamaica, received in February 2015. The letter states that McKinley was now a member of the Blood gang and that he blamed the Applicant for snitching on him to the police which, he believed, caused his imprisonment in the US and deportation to Jamaica. McKinley threatened the Applicant's life should he return to Jamaica. The Applicant submits that the letter established that he was being specifically targeted, but the PRRA Officer mentioned it only by way of a quote from the PRRA submissions of his counsel. Although decision-makers are not required to mention every piece of evidence, the letter contradicts the PRRA Officer's finding that the Applicant was subject to only a generalized risk (*Tomlinson v Canada (Citizenship and Immigration)*, 2012 FC 822 at paras 15, 17-19). The Applicant submits that it is a reviewable error to draw conclusions that are contrary to relevant evidence before the decision-maker (*Owusu-Ansah v Canada (Minister of Employment and Immigration)(1989)*, 8 Imm LR (2d) 106 at 113 (FCA)). The Applicant also submits that his entire PRRA application

revolved around the threats to his life by McKinley, but that the PRRA Officer overlooked this issue.

[11] Further, that the PRRA Officer found that "there is insufficient objective evidence to conclude that the applicant would be personally targeted…six years after he left that country in July 2009". However, although the Applicant relied on the letter received in February 2015 identifying the threat from McKinley, the PRRA Officer focused only on 2009, when the Applicant had left Jamaica.

[12] The Applicant also submits that the PRRA Officer erred in his or her conclusions on state protection because it is unclear whether he was applying the adequacy test or improperly applying a serious efforts test. Further, that the documentary evidence demonstrates that gangs in Jamaica are better equipped than the police who are ineffective against them. Finally, the Applicant submits that the PRRA Officer's conclusion that the Applicant was a permanent resident of the US and that he could return there was made without regard for the evidence, and was therefore unreasonable, as there is no evidence that deportees maintain their status in the US.

Respondents' Submissions

[13] The Respondents submit that the PRRA Officer did not ignore or fail to consider the letter submitted by the Applicant. The PRRA Officer indicated that there was new evidence that required consideration and, because the letter was the only new evidence of a recent threat, the Officer must have considered it. The PRRA Officer also specifically summarized the Applicant's evidence on the issue, but concluded that the evidence was insufficient to determine

that the Applicant would be personally targeted. The Respondents submit that the Applicant asks this Court to come to a different conclusion than the PRRA Officer based on an undated self-serving note to which the PRRA Officer gave little or no weight (*Micolta v Canada (Citizenship and Immigration)*, 2015 FC 183 at para 13).

[14] The Respondents also submit that the determinative issue is state protection and that the Applicant failed to provide clear and convincing evidence of the state's failure to protect targeted victims. The Applicant was required to establish that the Jamaican authorities would be unable to protect him from McKinley in order to satisfy the test under s 97 of the IRPA. The Applicant's documentary evidence about the high rate of crime, the power of criminal gangs, the distrust of the police and allegations of police corruption speaks to the prevalence of crime and the generalized nature of the crime, not the state's ability to protect him from a direct threat. The PRRA Officer reasonably concluded that that Applicant had failed to rebut the presumption of state protection because the documentary evidence submitted did not support the conclusion that a person who seeks police protection would not receive it. Further, the Applicant's own evidence demonstrates that a witness protection program in Jamaica is effective.

[15] Further, the PRRA Officer reasonably relied on the RPD's findings regarding the Applicant's ability to return to the US because the Applicant failed to provide any evidence contradicting the RPD's decision. Regardless, the issue is immaterial given the reasonableness of the PRRA Officer's decision that the Applicant does not face a s 97 risk if returned to Jamaica.

Analysis

[16] As stated by Justice Gleason in *Portillo*, when conducting an analysis under s 97 of the IRPA, the starting point is to determine the nature of the risk faced by the claimant. This requires an assessment of whether the claimant faces an ongoing or future personalized risk, what the risk is, whether the risk is one of cruel and unusual treatment or punishment and the basis for the risk. The next step is the comparison of the correctly described risk faced by the claimant to that faced by a significant group in the country to determine whether the risks are of the same nature and degree (*Portillo* at paras 40-41).

[17] In this case the PRRA Officer's reasons are brief. When stating the risk identified by the Applicant the PRRA Officer stated only that the Applicant faces a risk to his life in Jamaica. The Officer stated that careful consideration had been given to all of the evidence before him or her and ticked the box on the PRRA form to indicate that there was new evidence. However, the Officer did not state what that new evidence was. The PRRA Officer goes on to find that, based on the evidence before him or her, it was clear that in Jamaica gang-related violence and violent crime is a widespread problem. The Officer then quotes from the written PRRA submissions made by the Applicant's counsel stating that "The applicant had personal problems with the Blood gang prior to leaving Jamaica and the recent threats from one Denis McKinley, raises the Applicant's apprehension of fear from his safety in Jamaica". The PRRA Officer concluded that the high level of violent crime is a generalized risk faced by all citizens of that country and that there was insufficient objective evidence to conclude that the Applicant would be personally targeted if removed.

[18] The difficulty with this conclusion is that the Applicant claims he is being personally targeted by McKinley because McKinley believes the Applicant informed the US authorities about his criminal conduct. However, the PRRA Officer does not directly refer to the letter which is the basis for the Applicant's claim of a personalized risk. The nature of that risk is not determined as the Officer did not assess it, nor is there any comparison of the risk faced by the Applicant to the generalized risk of gang violence faced by the general population to determine if those risks are of the same nature and degree. Further, the nature of the risk that he faces now may not be the same risk that he faced in 2009. Accordingly, in my view, the PRRA Officer failed to carry out the necessary s 97 analysis.

[19] The Respondents refer me to *Roberts v Canada (Citizenship and Immigration),* 2013 FC 298 and submit that it is distinguishable from the matter before me. There Justice Gagné referred to *Portillo* and stated:

> [19] I find that the panel erred in conducting both steps of the required analysis. First, it made an unreasonable characterization of the nature of the risk faced by the applicant, stating on one hand that the applicant was "a victim in a criminal vendetta situation" in Saint Vincent and yet determining his risk as being a generalized risk due to generalized crime activity. As stated earlier, the panel made no reference to any of the applicant's evidence, including written testimony from the applicant's friends who received death threats against the applicant. Given that the panel had to determine on the basis of that evidence whether the applicant suffered a heightened risk of harm as compared to the risk of harm faced by the general population – including the risk of reprisal – and considering the panel's erroneous statement that "the fact that this claimant has been specifically and personally targeted by the gang of criminals is irrelevant to the determination of whether the risk that he faces at their hands is generalized" (my emphasis), I find that the panel's failure to conduct an individualized assessment in light of the applicant's evidence in its entirety constitutes a reviewable error.

[20] It appears to me that, while the PRRA Officer in this case did not state that the Applicant had been specifically targeted, for the reasons set out above he or she otherwise similarly erred.

[21] The Respondents also submit that while the PRRA Officer did not specifically refer to the letter, it was the only new evidence and, therefore, must have been considered. Further, that the Officer found that there was insufficient objective evidence before him or her to conclude that the Applicant "would be personally targeted to be a victim of violence if her were removed to Jamaica, close to six years after he left that country in July 2009". The Respondents submit that this clearly shows that the PRRA Officer considered the letter but reasonably afforded it little weight.

[22] I would note, however, that the presumption that a decision-maker has considered all of the evidence (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16) may be rebutted when the decision-maker fails to directly address or explain why it disregarded a particular piece of evidence that contradicts an essential element in the decision (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, (1998) 157 FTR 35 (Fed TD) at para 17; *Nguyen v Canada (Citizenship and Immigration)*, 2015 FC 59 at para 5). In this case, the PRRA Officer does refer to the threat from McKinley, but only in the context of a quote from the Applicant's submissions. Further, the Officer does not say that he or she is affording the letter little weight or why this may be the case, nor is this discernible from a review of the record. We do not know why the letter, if it was considered, was insufficient. In this regard, it is of note that neither the RPD nor the PRRA Officer made any adverse credibility findings concerning the Applicant.

[23] Given that the letter was the critical piece of evidence that spoke to the alleged personalized risk, in my view, the PRRA Officer erred in failing to address it and in failing to conduct the required s 97 analysis.

[24] However, in addition to finding that the risk faced by the Applicant was a generalized one, and therefore did not fall within s 97, the PRRA Officer also found that the Applicant had failed to rebut the presumption of state protection. In my view, this is the determinative issue (*Sran v Canada (Citizenship and Immigration)*, 2007 FC 145 at para 11; *Matute Andrade v Canada (Citizenship and Immigration)*, 2010 FC 1074 at paras 45, 67).

[25] As a preliminary point I note that the Applicant submits that it is unclear whether the PRRA Officer was applying the correct test for state protection, being adequacy, rather than serious efforts. Although the reasons are cursory, they are sufficient to demonstrate that the PRRA Officer was aware of the proper adequacy test for state protection. The PRRA Officer stated that "the applicant has not met the evidentiary burden of providing clear and convincing proof that adequate state protection would be unavailable to him in Jamaica if it were necessary", indeed the PRRA Officer makes no mention of "serious efforts". Accordingly, the Applicant's submission on this point is of no merit.

[26] The Applicant also submits that state protection must be effective "to a certain degree" to be adequate. And, because the documentary evidence established that violence is widespread and that the police have low rates of success in solving violent crimes, this establishes that state protection in Jamaica is not adequate. The Respondents, however, submit that the test for state

protection is found in *Canada (Minister of Citizenship and Immigration) v Carillo,* 2008 FCA 94 [*Carillo*], being that a claimant seeking to rebut the presumption of state protection must adduce reliable, clear and convincing evidence which satisfies the decision-maker that, on a balance of probabilities, the state protection is inadequate and that the Applicant simply failed to do so in this case.

[27] Here the PRRA Officer acknowledged problems with policing in Jamaica but also found that the documentary evidence did not support a conclusion that police protection would not be available to the Applicant if his life were in danger and that the Applicant had not met his evidentiary burden.

[28] A review of the record indicates that the evidence on police effectiveness is mixed. Some of the articles speak to trials and convictions for gang members and corrupt police while others speak to corruption and gang impunity. I would also note that the Applicant's submission boils down to the premise that, where police struggle with a generalized risk, in this case gang violence, this is sufficient to rebut the presumption of state protection, however, this is not in keeping with the jurisprudence (*Sanchez Aguilar v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1054 at paras 10-14).

[29] As the Respondents submit, the Applicant must provide clear and convincing evidence to rebut the presumption of state protection (*Varadi v Canada (Citizenship and Immigration)*, 2013 FC 407 at para 31; *Carillo* at para 30). It is also well established that it is not the role of this Court to re-weigh the evidence that was before the decision-maker (*McLean v British Columbia*

(Securities Commission), 2013 SCC 67 at paras 19-33; *Dunsmuir* at para 47; *Kovacs v Canada (Citizenship and Immigration)*, 2015 FC 337 at para 20).

[30] As the PRRA Officer recognized, gang violence is widespread in Jamaica and there are "problems with respect to policing". However, given the mixed nature of the evidence, in my view, it was open to the PRRA Officer to find that the Applicant had failed to rebut the presumption in this case. Accordingly, the PRRA Officer's conclusion on state protection fell within the possible, acceptable outcomes and is, therefore, reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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