

Federal Court



Cour fédérale

Date: 20171019

Docket: IMM-485-17

Citation: 2017 FC 928

Ottawa, Ontario, October 19, 2017

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

CARLOS ROSALES

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is a review of a decision of a Senior Immigration Officer rejecting Mr. Rosales' Pre-Removal Risk Assessment [PRRA] application. The Officer found that he would not face a risk described in sections 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 if removed to Guatemala.

BACKGROUND

[2] Carlos Rodolfo Rosales [Carlos] was born in Guatemala in 1988. He came to Canada as a permanent resident in 1992, at the age of four.

[3] Carlos shares a name and the date of his birth with his father Carlos Rodolfo Rosales Morales [Mr. Rosales Sr.]. Mr. Rosales Sr. was detained and tortured by Guatemalan authorities during the civil war (1960-1996). Moreover, his family was targeted by the Guatemalan regime beginning in the late 1950s. Four of his uncles were kidnapped and murdered as a result of their human rights advocacy and opposition to the Guatemalan government. Another of his uncles was detained by Guatemalan authorities and accused of being a student opposition leader. This uncle was eventually released, but was subsequently kidnapped, tortured, and murdered in 1970.

[4] In the late 1980s Mr. Rosales Sr. was kidnapped by Guatemalan security forces. He was beaten, accused of murdering a student, and accused of being a political opponent. He was detained for 14 months awaiting his trial, during which time he was interrogated and tortured. He was acquitted of all charges at trial. The judge who acquitted him was found murdered in his home three months after the trial.

[5] Shortly after the release of Mr. Rosales Sr. armed men attempted to kidnap him and his wife Reyna Giron Recinos [Reyna], who was injured in this attempt. She complained to the police and was told by them to stay away from Mr. Rosales Sr. and that they wanted to kill him. Mr. Rosales and Reyna fled Guatemala City for another region in Guatemala, and eventually fled the country altogether. They were resettled in Canada in 1991 after being recognized as

Convention Refugees by the United Nations. They subsequently sponsored Carlos and his siblings Henry and Randall to come to Canada.

[6] In December 2010, Carlos was convicted of a number of criminal offences. As a result of these convictions he was found inadmissible for serious criminality pursuant to paragraph 36(1)(a) of the Act and was issued a deportation order by the Immigration Division. He appealed this order to the Immigration Appeal Division, but the appeal was denied.

[7] Carlos submitted a PRRA application in May 2015. The application was rejected on November 27, 2015. He filed an application for leave and for judicial review. Before the application for leave was adjudicated, the Minister agreed to reconsider his PRRA application. Carlos filed additional documentary evidence and made new submissions in support of his renewed application in June 2016. On November 21, 2016, the PRRA application was refused again. He was notified of the refusal on January 18, 2017.

[8] Five main issues were addressed by the Officer: Carlos' health, his ability to provide for himself in Guatemala, his concern that he would be targeted as a deportee, his concern that he will be targeted as a result of his family or perceived political opinion, and the availability of state protection.

Health

[9] The Officer noted that Carlos has been diagnosed with autoimmune hepatitis, but found that this did give rise to a risk to his life pursuant to sections 96 or 97 of the Act.

Economic Concerns

[10] The Officer noted Carlos's submission that he would not be in a position to provide for himself in Guatemala as a result of his medical condition, but the Officer found that economic hardship is not a risk that falls within sections 96 or 97 of the Act.

Targeted as a Deportee

[11] The Officer noted that Carlos provided reports and articles confirming that kidnapping and violence are serious problems in Guatemala. However, the Officer found that Carlos had provided insufficient objective evidence that he, in particular, would be perceived as a wealthy individual, or that his family in Guatemala would be perceived as wealthy. The Officer also found that there was insufficient objective evidence that he would be unable to avail himself of state protection if threatened.

Targeted Because of his Family

[12] The Officer acknowledged Carlos' concerns that long-standing grudges are still held against his family. However, he noted that much of the violence and torture that Carlos fears occurred many years ago. The Officer further noted that there is a new regime in Guatemala. He concluded that there was insufficient objective evidence to show that Carlos would be targeted as a result of his family.

[13] The Officer accepted that Carlos' brother Henry, who had been deported to Guatemala in 2007, was attacked and shot in Guatemala by unknown individuals. The Officer acknowledged that both Carlos and his parents indicated that his attackers told Henry that they targeted him

because of his father and that they intended to kill Henry. However, the Officer found there was insufficient corroborating evidence to substantiate that this attack was the result of Henry's family. The Officer further found there was insufficient recent evidence to show the applicant would be similarly attacked or shot if he returned to Guatemala.

State Protection

[14] The Officer concluded that Carlos had not rebutted the presumption of state protection. The Officer noted that there was no evidence that Henry had sought state protection after being attacked. The Officer quoted the Supreme Court in *Ward v Canada (Minister of Employment & Immigration)*, [1993] 2 SCR 689, for the proposition that a state is presumed to be capable of protecting their citizens.

[15] The Officer found that the evidence presented by Carlos did not show that state protection would be withheld from him in particular. The Officer further found that the evidence did not indicate the government permits or condones violence, crime, or corruption. Finally, the Officer determined there was not a "total breakdown of state apparatus" such that protection would not be afforded to individuals such as the applicant.

ISSUES

[16] Carlos submits that:

1. The Officer's decision is unreasonable because it was made without regard to the evidence;
and

2. The Officer's findings regarding the sufficiency of the evidence were unreasonable and were veiled credibility findings entitling Carlos to a hearing, and failing to do so amounted to a breach of procedural fairness.

[17] Carlos submits that the first issue should be decided on the reasonableness standard of review, and the Minister agrees. He submits that the second issue is to be decided on the standard of correctness. The Minister submits that the Officer made no veiled credibility findings and thus his assessments of sufficiency of evidence are to be weighed on the reasonableness standard. As I have found the Officer's analysis of the evidence to be unreasonable, I will not address the submission that he or she made veiled credibility findings.

ANALYSIS

[18] I have concluded that it would be unfair to Carlos for the Minister to rely on the Officer's decision. I find that this Officer failed to conduct a full and impartial review of the evidence that Carlos submitted with his application. In particular, I agree with Carlos' submissions at paragraphs 36 to 39 of his written submissions, which are as follows:

The Officer makes no serious effort to address the issues and evidence before him.

The Officer does not cite a single piece of country condition documentation to support his conclusion that the Applicant would not face a risk under s. 96 and s. 97 of the IRPA and that state protection would be available to him.

The Officer does not analyse any of the evidence submitted by the Applicant that contradicts his findings, particularly regarding state protection, other than to acknowledge once that the "applicant has provided numerous reports and articles to confirm that kidnapping and violence are serious problems in Guatemala".

The entirety of the over 300 pages of documentary evidence submitted by the Applicant, and his counsel's written submissions connecting that evidence to his particular circumstances, are left without mention by the Officer.

[citations omitted, emphasis in original]

[19] The following, brief passages from two of the documents submitted appear to be directly contrary to the Officer's conclusions and support Carlos' assertion that he would not have state protection in Guatemala, but they were not addressed by the Officer:

4. Effectiveness of Complaints Mechanisms

The official from the Embassy of Canada to Guatemala stated that "[m]any people do not bother to report crime or fraud as the authorities here do very little in terms of investigating and prosecuting, due to limited resources and/or corruption" (Canada 3 Mar. 2015). Similarly, the associate at Permuth y Asociados said that there are many complaints that are not investigated due to police corruption and other "influences" (Associate 26 Feb. 2015b). Several sources state that impunity rates are high (DCAF 16 Jan. 2015; US 14 May 2014; Human Rights Watch 2014). According to a report published by the Geneva Centre for the Democratic Control of Armed Forces (DCAF), "an international foundation whose mission is to assist the international community in pursuing good governance and reform of the security sector" (n.d.), the rate of impunity is estimated to be at around 90 percent and may be as high as 98 percent for crimes such as homicide, "with only two out of 100 cases making it to court" (DCAF 16 Jan. 2015). The US Department of State's Guatemala 2014 Crime and Safety Report states that 70 percent of murders in Guatemala City went unpunished in 2012, while the rate was 97 percent in 2010 (US 14 May 2014, 8). [emphasis added]

IRB Response to Information Request, Guatemala GTM105110.E, April 14, 2015

3.3 Police, army, and the penitentiary system

An important quota of human rights violations and the violation of other laws occur directly by the National Civilian Police (PNC). The PNC is the public security institution with the highest number of complaints registered against it in regard to acts that

violate human rights and its links to organized crime. ... But all too often citizens distrust and fear the police – widely dismissed as inefficient, corrupt and abusive – as much as the criminals.
[emphasis added]

Guatemala – Background Paper, UNHCR, October 2013

[20] I am very troubled by the following statement of the Officer: “I have read and carefully considered all of the documentary material presented in association with and in support of this application in addition to conducting my own independent research into country conditions in Guatemala as they relate to the applicant.”

[21] The Minister concedes that the Officer’s “own independent research” was the *U.S. Department of State, 2015 Human Rights Reports: Guatemala, 13 April 2016* which the Officer lists at the end of his report under the heading “Sources Consulted.”

[22] Given that this report is one of the documents submitted in support of Carlos’ application, two conclusions must be drawn: No independent research by the Officer was required, and he could not have “read and carefully considered all of the documentary material presented” or he would have noted that it was in the package presented to him.

[23] I am satisfied that this Officer, in fact, did not read, consider, and weigh the evidence presented with this PRRA application.

[24] I am also very troubled by this Officer's characterization of some of the evidence submitted in support of the PRRA application; in particular, the evidence related to Carlos' brother Henry being attacked in Guatemala. The Officer writes that he:

[C]arefully considered the applicant's narrative and the letters from his parents. ...

The applicant and his parents have indicated that his brother Henry was attacked in Guatemala in February 2007 and that his attackers had stated that they knew he was the son of the applicant's father and that they were going to kill him; however, no corroborating evidence has been submitted to substantiate this statement. I acknowledge that Henry was attacked and shot by unknown individuals; however there is insufficient corroborating evidence submitted to substantiate that the attack was based on who his father is or to indicate that the applicant would also be attacked and/or shot for any reason upon his return to Guatemala. [emphasis added].

[25] First, what the Officer describes as "letters" were sworn affidavits submitted by both of Carlos' parents attesting to the facts of Henry's attack as he described it to them. This evidence benefits from the presumption of truthfulness: *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FCR 302.

[26] Second, there are only two parties who could provide the corroborative evidence the Officer sought: the attacker and Henry. The attacker is unknown and, in any event, is unlikely to swear an affidavit that he tried to murder Henry. Henry survived and went into hiding, but could provide an affidavit. However, his explanation for not doing so is set out in his father's affidavit:

We have asked Henry to provide a statement in support of this application, but he is too scared. He is afraid to send something in the mail because he is worried about getting found and having people come after him again.

[27] The Officer fails to engage with this explanation. Given that Henry had been previously attacked, shot at, and gone into hiding, this explanation of him not providing his evidence might well seem acceptable, and in fact understandable, to any reasonable person knowledgeable of the conditions in Guatemala and the fact that the rate of impunity for murder is 90% or more.

[28] In summary, I find the Officer's decision to be unreasonable because he or she failed to independently and fully engage with the evidence submitted and because he or she mischaracterized some of the evidence that was considered.

[29] Neither party proposed a question for certification nor is there one on these facts.

JUDGMENT IN IMM-485-17

THIS COURT'S JUDGMENT is that the application is granted, the decision under review is set aside and the application is to be determined by a different officer, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-485-17

STYLE OF CAUSE: CARLOS ROSALES v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 2, 2017

JUDGMENT AND REASONS: ZINN J.

DATED: OCTOBER 19, 2017

APPEARANCES:

Andrew Brouwer

FOR THE APPLICANT

Nicole Paduraru

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Refugee Law Office
Legal Aid Ontario
Barristers and Solicitors
Toronto, Ontario

FOR THE APPLICANT

Attorney General of Canada
Department of Justice
Toronto, Ontario

FOR THE RESPONDENT