Federal Court  Cour fédérale

Date: 20190410

Docket: IMM-3763-18

Citation: 2019 FC 431

Ottawa, Ontario, April 10, 2019

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

LUIS FERNANDO RAMOS AGUILAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of the Refugee Protection Division [RPD] decision dated June 11, 2018 [the Decision]. In this Decision, the RPD 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 removed to Mexico.

II. Background

[2] Luis Fernando Ramos Aguilar [the Applicant] is a citizen of Mexico.

[3] In December 2000, the Applicant left Mexico to go to the United States. He lived and worked there for four years.

[4] On January 22, 2005, after the Applicant returned from the United States, he opened a restaurant in Mexico City.

[5] On February 24, 2005, the Applicant was approached by four men, which he refers to as "the fraternity". The Applicant alleges that these men told him that they were sent by "Jarocho", who was in control of the territory in which he opened his restaurant, and that he would have to pay money to them should he wish to keep operating his business. The Applicant agreed to pay 2000 pesos a month to them.

[6] On August 27, 2005, the Applicant alleges that he was visited by Jarocho, the boss of the organization, who announced to him and other local business owners that they would be required to pay 5000 pesos from then on to keep operating their businesses.

[7] In September 2005, the Applicant was once again visited by the fraternity at which point he refused to pay them. This resulted in a fight, during which the men who visited the Applicant threatened to kill him.

[8] On September 15, 2005, after the Applicant closed the restaurant, he alleges that he was followed by men in a car who kidnapped and physically abused him. The Applicant's attackers eventually fled after the police arrived on the scene. One of the Applicant's attackers was arrested and the Applicant recognized him as "El Memo", one of the men who had previously visited him to request extortion money. The Applicant alleges that he was taken by a Red Cross ambulance to the hospital for treatment of the injuries he sustained.

[9] On September 30, 2005 the Applicant learned that El Memo had been released from jail because he had paid off the authorities with the help of his boss Jarocho. The Applicant's brother received calls from their neighbours warning them that the men were looking for the Applicant and wanted to kill him. As a result, the Applicant fled Mexico to seek protection in Canada.

[10] On October 28, 2005, the Applicant arrived in Montréal. The Applicant then settled into the home of a Mexican family in Toronto along with his wife and brother. The Applicant alleges that he never thought to seek refugee status because he thought that the problem in Mexico was solved and he was not familiar with the legal process to obtain refugee status. The Applicant and his family remained in Canada for two months, then returned to Mexico.

[11] On May 30, 2006, while the Applicant and his wife were grocery shopping, they found a severed animal's head on top of their car and a message written on the back window saying "We found you jerk". The Applicant decided to send his wife, his child, his mother-in-law and his brother-in-law to Monterrey, Mexico to keep them safe.

[12] On June 20, 2006, the Applicant fled Mexico for Canada.

[13] In April 2007 the Applicant returned to Mexico.

[14] Between May 2007 and October 2008, the Applicant and his family were contacted multiple times by Jarocho and the other members of the brotherhood by telephone who requested more money. The Applicant also alleges that during this time he was followed by car by members of the gang who threatened him.

[15] On April 10, 2009, the Applicant arrived in Canada, at which point he sought refugee status.

[16] In 2015, the Applicant alleges that his wife was attacked by police officers who showed her a photo of the Applicant and asked her if she knew this person.

III. Impugned Decision

[17] The determinative issue of the Applicant's claim was credibility. The RPD found that overall, the Applicant was not a credible witness, and that his fear of persecution at the hands of criminals was not objectively well-founded. The RPD also concluded that the Applicant lacked subjective fear of persecution.

[18] The RPD noted that certain aspects of the Applicant's testimony demonstrated that he lacked a subjective fear of persecution in Mexico. The RPD noted that the Applicant made no effort to seek refugee protection the first two times that he came to Canada, nor did he make any effort to seek information regarding refugee protection in Canada. The RPD also noted that the Applicant claimed that he returned to Mexico, the country where he faced death threats, to see his family. The RPD found that this behavior was not consistent with that of a person fearing for his life.

[19] The RPD also found significant inconsistencies in the Applicant's narrative. The RPD noted that at the hearing, the Applicant testified that he feared three individuals called El Chato, El Memo and El Jarocho, who was their leader. He testified that these individuals belonged to a gang called Los Tenien that operates all over Mexico. Although the Applicant's Personal Information Form [PIF] narrative mentioned the names of these three criminals, it did not mention Los Tenien, the gang to which they allegedly belonged. However, the Applicant's counsel indicated that the three men were criminals who were associated with Hermandad, a gang of corrupt police officials, while the police report provided by the Applicant indicated that El Jarocho was a member of the brotherhood, who had contacts with Los Zetas. When asked why he had omitted the name of the gang, the Applicant indicated that he became aware of Los Tenien in September 2012. The RPD found that this explanation was not reasonable, as later in his testimony the Applicant indicated that he was not aware that the name of the gang had been omitted from his PIF. The RPD noted that the Applicant was represented by counsel at the hearing, and that as such, it would have been expected of him to have amended his PIF narrative

prior to the hearing to include the name of the gang after he received that information in September 2012.

[20] The RPD further noted that there is no persuasive documentary evidence from an independent and reliable source indicating that the the Applicant was targeted for extortion and mistreated by three criminals that belonged to the Los Tenien group.

[21] The RPD also noted that although the Applicant testified that on September 15, 2005, after he was kidnapped and taken to the hospital by a Red Cross ambulance, he presented no evidence to substantiate the injuries. At the hearing, the Applicant was asked if he had the ambulance report or the hospital report and he indicated he had none. The Applicant testified that he had lost those reports and that his brother was not able to obtain copies of the reports. The Applicant did not produce documentary evidence from his brother to indicate what efforts he made to obtain the hospital and ambulance reports and why he failed, nor did he present documentary evidence from an independent and reliable source indicating that he was taken to the hospital after he was mistreated by criminals.

[22] The RPD further noted that the police report provided by the Applicant could have been manufactured with relative ease by anyone having knowledge of a computer. Although the contents of the report were typed legibly, none of the alleged police stamps on the report were legible or initialled by the police officer who wrote the report as compared to the translator's stamps. The stamps were also not embossed, and the RPD considered that as such, they could easily have been manufactured also. The RPD also noted that the Applicant did not provide

identity documents of the officers who allegedly signed the report, nor did he provide any information or other documentary evidence from the Mexican authorities indicating that the persons who had signed the report belong to the police force in Mexico. Based on the evidence adduced and since the RPD found that the Applicant lacked subjective fear of persecution in Mexico, it found that the police report was likely fabricated for the purposes of the refugee claim.

[23] Overall, the RPD found that the Applicant was not extorted or kidnapped for nonpayment of extortion. The RPD found that the Applicant likely fabricated his story about being extorted and being kidnapped when he allegedly failed to pay extortion money. The RPD concluded that the Applicant does not face a risk to his life or of being subjected to cruel and unusual treatment or punishment or to a danger of being tortured, should he return to Mexico.

[24] The Applicant now seeks judicial review of this Decision.

IV. Issues

[25] The Applicant submits the application raises two issues:

a) Did the RPD breach procedural fairness and natural justice in not allowing the Applicant a reasonable opportunity to know of the Member's adverse credibility findings pertaining to the police report?

b) Did the RPD act with bias in the exercise of its discretion?

[26] Because there is no probative evidence to support the bias claim, it will not be considered, apart from remarks concerning the making of such allegations against the RPD.

V. Standard of Review

[27] The issue raised by the Applicant is one of procedural fairness. It is reviewed on the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 1061. That being said, a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference'" (*Bergeron v Canada (Attorney General)*, 2015 FCA 160 at para 69).

[28] It is also the Court's view that the Applicant is ultimately challenging a credibility finding of fact. His single focus of unfairness relates to the adverse credibility finding regarding the putative police report, in addition to comments on the insufficiency of its corroborating evidence. The other adverse credibility findings are not seriously challenged.

[29] The standard for the review of credibility findings was aptly described by my colleague Justice Keith M. Boswell in *Odia v Canada (Citizenship and Immigration)*, 2018 FC 363 at para 6 when stating that credibility findings should not be overturned except "in the clearest case of error", as follows:

> [6] …It is accepted that significant deference is owed to credibility determinations (see: *Martinez Giron v Canada (Citizenship and Immigration)*, 2013 FC 7 at para 14, 176 ACWS (3d) 505). As noted by the Court in *Njeri v Canada (Citizenship and Immigration)*, 2009 FC 291:
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> > [11] On credibility findings, I have noted the reluctance that this Court has, and should have, to overturn such findings except in the clearest case of error (*Revolorio v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1404). The deference owed acknowledges both the contextual circumstances and legislative intent, as well as the unique position that a trier of fact has to assess testimonial evidence. That deference is influenced by the basis upon which credibility is found. The standard is reasonableness subject to a significant measure of deference to the Immigration and Refugee Board.
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> [My emphasis.]

[30] As the Court is prevented from reweighing evidence, insufficiency of evidence is not a ground to overturn a finding of fact, as long as there is some evidence of it and it is not plain to see that the finding of fact is wholly unreasonable: *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at para 61.

VI. Analysis

[31] The Applicant relies on the transcript of the RPD's hearing that refers to a five-minute off the record conference of the Applicant's counsel with the RPD Member [the Member] during which time instructions were given as to written submissions and post-hearing disclosure. After the conference, the Member stated the following on the record:

> We are back on record. All parties are present. Sir, I had a brief discussion with your counsel. Because she has to get the lease agreement translated, she has promised to give me submissions within two weeks or so. And I guided her into what kind of areas she would address…credibility supported by documentary evidence, your exit from Mexico, your stay in Canada, not applying for asylum and returning…that is an issue. I want her to address the criminality as being a generalized risk…why doesn't she think it is a generalized risk in this case. She is going to address all this in a written submission and as soon as I get…I'll get your response within one week. I'll try to get it to you before the end of the month June.
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> [My emphasis.]

[32] The Applicant argues that the Member made many credibility findings that were not raised with the Applicant. On that point, I find there to be only one, with respect to the police report. In addition, the Applicant claims that the Member "on more than one occasion indicated his intention to grant the claim." The Applicant argues that the Member should have put his concerns to the Applicant clearly, and should have identified them as needing to be addressed in the post-hearing submissions.

[33] The Applicant particularly emphasizes that although the Member found significant issues with the police report submitted by the Applicant, he did not put these concerns to him. As such, the Member deprived the Applicant of a reasonable opportunity to present evidence, question witnesses and make representations, as required by s. 170(*e*) of the IRPA. It is simply the incarnation of procedural fairness in stating that the RPD must provide parties with a "reasonable opportunity to present evidence, question witnesses and make representations".

[34] The Court finds no evidence that the Member on any occasion indicated his intention to grant the claim. This bald statement is contained in an affidavit of an articling student to which was appended a typed version of the student's handwritten notes taken at the hearing, which were not attached. In correcting the overstatement, the Member's receptivity to the Applicant's claim was inferred. Because of his gratuitous advice and permission allowing him to file supplementary materials to support his client's contentions, the Applicant's counsel concluded that the Member did not want to have to reject the Applicant's complaint. I indicated at the hearing that without the handwritten notes taken at the time of the meeting, the affidavit evidence was not sufficiently reliable in the circumstances where the Member is not in a position to respond to such serious allegations. Even so, providing an opportunity to file additional evidence is hardly an indication of an intention to provide a favourable outcome, particularly when the Member's statement made after the meeting indicated that credibility was still in issue.

[35] The only submission advanced by the Applicant of any import arising from the off-the-record meeting pertained to the evidentiary insufficiency and credibility findings involving the police report. Even if the Court were to concede that the Member erred in some fashion by misleading the Applicant not to present further evidence with respect to the police report, this would be insufficient to have the Decision set aside.

[36] As described above, there were several credibility deficiencies raised by the Member. Without the need to refer to the police report, they are sufficient to support an adverse credibility finding of the Applicant. Where several adverse credibility findings are made and one turns out not to be well founded or in violation of a fact-finding process error, this must nevertheless be

measured against whether the remaining credibility conclusions were sufficient to support the Member's Decision. It is not as though overturning a single credibility finding has the effect of diminishing the other findings that remain. I find that the overriding credibility findings of the RPD were more than sufficient to support its conclusions that the Applicant was not credible.

[37] Moreover, the finding of a lack of credibility concerning the police report was itself only a supplemental finding. It relied upon the previous adverse credibility conclusions. This is evident from para 29 of the Decision as follows:

> Therefore, based on the evidence adduced and since the panel finds that the claimant lacked subjective fear of persecution in Mexico, the panel believes that the police report the claimant provided is fabricated for the purpose of his refugee claim and the panel gives no value to it.
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> [My emphasis.]

[38] In other words, the credibility concern about the police report was not even a standalone finding; again pointing to the fact that the adverse credibility finding was based on a number of concerns, and only supplemented by those concerning the police report.

[39] Finally, the Applicant misapprehends the nature of the duty of fairness in the circumstances of this case. His complaint is that amongst all the items that were discussed in the off the record session, no mention was made about the deficiencies in the police report. In effect, he is arguing that the Member should have advised the Applicant of the deficiencies in his evidence so that he could take steps to enhance its probative value.

[40] If the Member overlooked the police report in the off-the-record discussion, I am satisfied that it was not done intentionally. More logically, the inadequacies of the police report were perceived as an issue in conjunction with the other adverse credibility findings after the hearing at the time the Member considered all of the evidence together, as was his duty to do so.

[41] As an aside to this argument, I must express my criticism of RPD members holding off-the-record discussions of substance with the parties. The RPD is a tribunal of record and discussions of this nature should not occur without being transcribed. It is also in the Member's self-interest to have such discussions recorded to avoid exactly what happened in this matter. Unrecorded discussions are only permissible for procedural or similar collateral issues that do not touch on matters that relate substantively to the Decision itself.

[42] Returning to the argument of the Applicant, it misplaces his onus to prove his case. He entered into evidence the police report that contained a number of irregularities not found on an official document. Moreover, it was insufficiently corroborated by failing to identify its author. There is no obligation on a member to raise such evidentiary inadequacies with an applicant when represented by highly competent counsel. To impose such a burden on the decision-makers would make their task intolerable, inasmuch as problems with evidence are not always discerned without mature reflection on their nature.

[43] Moreover, the Applicant seeks to impose a double standard. He operates on a purely adversarial basis. By immigration procedural rules he is not required to disclose all relevant documents, accompanied by a formal attestation that counsel has advised the client to produce

such documentation, signed by counsel and the client. Similarly, in the realm of facts, the Applicant is entitled to lead only evidence that supports his case, without reference to evidence that is unhelpful, so long as the effect is not to mislead the Court. Thus, to turn around and suggest that the members should disclose to applicants every concern that they may have with a claimant's evidence, misstates the fairness rule.

[44] Finally, the Member's reasons were said to be unreasonable in imposing an obligation on the Applicant to identify the author of the police report, a very limited form of authentication in comparison with that required in ordinary civil procedures. The fact is that there is an obligation on parties to corroborate evidence where it is reasonably feasible to do so. Technology has changed the situation in terms of the availability and access to information from countries of origin.

[45] Technology has greatly facilitated the availability of corroborative evidence in comparison with the circumstances in 1980 when the decision of *Maldonado v Minister of Employment and Immigration*, [1980] 2 FC 302 (C.A.) (QL) [*Maldonado*] was issued. There should be no excuse based on the *Maldonado* decision for lawyers not to advise their clients to obtain the necessary and available corroborative evidence to demonstrate that their documentation is "credible or trustworthy in the circumstances". Properly authenticated documentation is the norm in other quasi-judicial and judicial arenas. There is no reason in today's global communications village that similar norms should not apply in immigration matters.

[46] My final remarks are directed at the alleged bias claim, which I have already rejected as being unfounded. The Applicant's single factual submission was at the Member attacked the Applicants' credibility with "zeal". The allegation is unsupported by any evidence of the slightest probative value.

[47] It should be recognized that counsel are Officers of the Court. Allegations of bias against a Member of the RPD, or any administrative quasi-judicial or judicial decision-maker should only be advanced in the clearest of cases. These circumstances do not exist in this matter. Counsel should be guided by the Federal Court of Appeal's admonition in *Arthur v Canada (Attorney General)*, 2001 FCA 223, at para 8, as follows:

> [8] ... An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. ...

[48] The application is dismissed. No questions are certified for appeal.

JUDGMENT in IMM-3763-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and no question is certified for appeal.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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