Federal Court  Cour fédérale

Date: 20190712

Docket: IMM-4749-18

Citation: 2019 FC 930

Ottawa, Ontario, July 12, 2019

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

DAVID LENARDO MARINO OSPINA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review filed pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA] against a decision of a Senior Immigration Officer [the Officer] dated July 19, 2018. The Officer rejected the Applicant's Pre-Removal Risk Assessment [PRRA] application.

[2] The application for judicial review is allowed.

II. Background

[3] The Applicant, aged 30, is a citizen of Colombia and has no status in any other country. His PRRA was based on an alleged risk of persecution by the Revolutionary Armed Forces of Colombia [FARC]. In December 2014, the Applicant and his then-wife left Colombia and arrived in Canada, via the United States, and claimed refugee status. On June 4, 2015, the Refugee Protection Division [RPD] rejected their claims on the basis that there was adequate state protection. The Refugee Appeal Division [RAD] upheld the RPD's decision. Following the RAD decision, the Applicant separated from his wife.

A. *PRRA Application*

[4] On April 6, 2018, the Applicant submitted his PRRA application. While the Applicant's refugee claim was primarily based on FARC's targeting of his ex-wife, who was a dentist, his PRRA application focused on the alleged risk he faces from FARC as a journalist.

[5] The Applicant submitted new personal supporting evidence with his PRRA application. He provided translations of text message threats from FARC that his father received in March 2015 and April 2015, i.e. before his negative RPD decision. The Applicant explained that he was unaware that these messages existed until after his negative RAD decision. He stated that his father explained that he did not tell him about them earlier because he did not want him to worry. The Applicant also provided a copy of another threatening text message that his father received

on January 19, 2018. He also submitted a letter from his father dated April 12, 2018, which explained the threats he received after the Applicant left.

[6] The Applicant also provided a letter from his brother, who is a police officer in Colombia, dated April 16, 2018. In the letter, his brother states that the police would not be able to protect the Applicant in Colombia. The Applicant also attached to his affidavit a copy of another letter from his brother, dated January 13, 2015.

[7] Finally, the Applicant provided a letter from a former colleague, Mr. Agudelo, dated April 20, 2018, who states that he worked with the Applicant as an investigative journalist.

III. The PRRA Decision

[8] The Officer refused the Applicant's PRRA application on the basis that the Applicant had not rebutted the presumption of state protection.

A. *Treatment of the New Evidence*

[9] The Officer noted that the Applicant explained that he did not provide the evidence that predated the RPD decision earlier because his former counsel did not tell him everything that he should provide. The Officer noted that there was no supporting evidence for this claim and that the Applicant has not filed a complaint against his former counsel.

[10] The Officer rejected the text message evidence. The Officer states that the messages were "not probative of anything that was not accepted by the RPD" and that they "could have been sent by anyone." The Officer further rejected the evidence on the basis that "it predates the RPD decision and the explanations provided by the Applicant have not been supported by evidence."

[11] The Officer gave no weight to the letter from Mr. Agudelo, noting that the letter did not have a return address and was not supported by identification.

[12] The Officer found that there was no supporting evidence for the Applicant's claim that his complaints about FARC ads at the radio station where he worked brought his ex-wife to the attention of FARC, and therefore found this had no impact on his PRRA.

[13] The Officer accepted the letter from the brother dated April 16, 2018.

B. *State Protection Analysis*

[14] The Officer found that the case turned on the availability of state protection.

[15] The Officer relied on two country conditions documents in his or her state protection analysis: a US Human Rights Report for 2017 on Colombia and *COL106084.E 18 April 2018 Colombia: The Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revoluncionarias de Colombia, FARC), including demobilization of former combatants; information on dissident groups, including number of combatants, areas of operation, activities and state response (2016-*

April 2018) [the IRB FARC Report]. The Applicant did not submit the IRB FARC Report as part of his country conditions evidence.

[16] After reviewing this evidence, the Officer concluded that while there are some issues with the demobilization of FARC, there has been a reduction of violence in Colombia. The Officer concluded that the country conditions had in fact improved since the RPD decision and that the Applicant had not rebutted the presumption of state protection.

IV. Issues

[17] This application for judicial review raises the following issues:

A. *Whether the Officer's reliance on extrinsic evidence constitutes a breach of procedural fairness?*

B. *Whether the Officer erred in refusing to convene an oral hearing?*

C. *Whether the Officer's analysis of the country conditions evidence was unreasonable?*

[18] The first issue concerns procedural fairness and is reviewable on a correctness standard (*Canada (MCI) v Khosa*, 2009 SCC 12 at para 43). Where a breach of procedural fairness is found, no deference is owed to the decision maker.

[19] Decisions of this Court are divided on the issue of the standard of review applicable to the second issue. In light of the varying approaches, the Court's view is that the applicable standard of review for a PRRA Officer's decision whether to allow an oral hearing is that of

reasonableness as “the decision on that issue turns on interpretation and application of the officer’s governing legislation” (*Balogh v Canada (Citizenship and Immigration)*, 2017 FC 654 at paras 21-23).

[20] The third issue relates to the Officer’s assessment of the evidence and is therefore also reviewable on a reasonableness standard. Reasonableness is concerned with “the existence of justification, transparency and intelligibility within the decision-making process”, as well as “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Analysis

[21] For the following reasons, the application for judicial review is allowed.

A. *Does the Officer’s reliance on extrinsic evidence constitute a breach of procedural fairness?*

[22] The Applicant alleges that the Officer breached procedural fairness by relying on the IRB FARC Report, which was not provided by the Applicant in his PRRA application. The Applicant notes that his PRRA was submitted on April 6, 2018 and the IRB FARC Report was published twelve days later on April 18, 2018. The Applicant acknowledges jurisprudence that has clarified that procedural fairness is not breached by reliance on extrinsic evidence when the evidence is publicly available and not novel (see e.g. *Dubow-Noor v Canada (Citizenship and Immigration)*, 2017 FC 35). The Applicant argues that the IRB FARC Report was novel and not publicly available.

[23] The Federal Court of Appeal dealt with this issue in *Mancia v Canada*, [1998] FC 461 (FCA), where the Court stated at para 27:

> With respect to documents relied upon from public sources in relation to general country conditions which became available and accessible after the filing of an applicant's submissions, fairness requires disclosure by the post claims determination officer where they are novel and significant and where they evidence changes in the general country conditions that may affect the decision.
>
> [Emphasis added]

[24] The Court notes that although the Applicant submitted his PRRA forms on April 6, 2018, he did not submit his country conditions evidence until April 20, 2018, and his legal submissions on June 22, 2018. The Applicant therefore filed his legal submissions more than two months after the report became publicly available. Fairness does not require the disclosure of a general country conditions report, such as an IRB FARC Report, in these circumstances (*Chen v Canada (Minister of Citizenship and Immigration*, 2002 FCT 266, 218 FTR 12 at para 33). Therefore, the Court is not persuaded that the Officer breached procedural fairness by relying on the IRB FARC Report.

B. *Did the Officer err in refusing to convene an oral hearing?*

[25] The Applicant argues that the Officer erred in making veiled adverse credibility findings regarding the text message evidence, without convening an oral hearing and providing the Applicant with an opportunity to address these concerns. Section 167 of the *Immigration and Protection Regulations*, SOR/2002-227 provides the factors that an officer must consider in determining whether a hearing is required under paragraph 113(b) of the *IRPA*.

Hearing – prescribed factors	Facteurs pour la tenue d'une audience
167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	**167**. Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	*a)* l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	*b)* l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	*c)* la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[26] The Applicant submits that the Officer made two veiled credibility findings in regards to the text message evidence: first, that the explanations for why the two text messages provided earlier were not supported by corroborating evidence and second, that the messages "could have been sent by anyone". The Applicant argues that these are credibility findings because he produced sworn evidence attesting to the provenance of the text messages and his reasons for not providing the two text messages from 2015 at an earlier date. He relies on Justice Russell Zinn's statement in *Ferguson v Canada (MCI)*, 2008 FC 1067 at paragraph 16, that "the Court must look beyond the express wording of the officer's decision to determine whether, in fact, the applicant's credibility was in issue."

[27] The Applicant further argues that this evidence was central to the decision since the Officer concluded in his or her state protection analysis that "the evidence did not demonstrate that [the Applicant] is of interest on a personal basis to any possible dissidents in the event of a return to his country". The Applicant argues that these messages show that FARC dissidents continue to have an interest in finding him. As well, the Applicant submits that the text message evidence contradicts the Officer's central conclusion that conditions in Colombia have improved for the better.

[28] The Respondent argues that the Applicant's statement that he did not receive the text messages prior to the IRB was not disbelieved, but rather the Officer found that there was insufficient evidence to demonstrate this to be the case. As such, the requirement for an oral hearing was not engaged.

[29] The Court is not persuaded that the Officer erred by not holding an oral hearing. Regardless of whether the Officer's statements constitute a veiled credibility finding, his or her treatment of the text messages evidence was not central to the Decision. Although the Officer concluded that "the evidence did not demonstrate that [the Applicant] is not of interest on a personal basis to any possible dissidents," the Officer states next that "however, the issue is state protection". The Court is not satisfied that the credibility findings were central to the decision or that the evidence, if accepted, would justify allowing the application for protection, as required by s 167 of the IRPR.

C. *Was the Officer's analysis of the country conditions evidence unreasonable?*

[30] Finally, the Applicant argues that the Officer's analysis of the country conditions evidence was unreasonable because the Officer failed to analyze the evidence which showed that FARC is an ongoing threat in Colombia and that state protection is not available.

[31] The Applicant argues that the Officer failed to analyze the hundreds of pages of country conditions evidence which he submitted that showed that FARC dissidents remain a serious threat in Colombia. As well, the Applicant argues that the Officer selectively quoted from the two sources that he or she did refer to in the reasons and failed to address the information within these sources that contradicted the findings that FARC is no longer a threat and that state protection is adequate.

[32] The Respondent argues that the Applicant is asking the Court to re-weigh the evidence which was properly considered by the Officer.

[33] In the Court's view, the Officer's treatment of the country conditions evidence on state protection in Colombia was unreasonable. The Officer reproduced the first three paragraphs of the IRB FARC Report that discussed the process of demobilizing FARC in Colombia. However, the Decision does not address the remaining content of the report that discusses the ongoing risk caused by dissident FARC members who have rejected the peace agreement. This is unintelligible in light of the fact that, earlier in the Decision, the Officer noted that an estimated 800 to 1,500 FARC dissident members were not participating in the peace process. In addition to the relevant passages in the IRB FARC Report, the Applicant submitted a significant body of country conditions evidence going directly to the issue of the ongoing risk caused by FARC

dissidents in Colombia. Yet, the Officer did not analyze the relevant evidence to analyze whether dissidents would pose a risk to the Applicant.

[34] Further, although the Officer accepted the brother's letter as evidence, which states that police protection would not be forthcoming to the Applicant, the Officer provided no analysis of the letter in relation to his or her findings on state protection. Earlier in the decision, the Officer states that he or she would take this evidence into account at the state protection stage. The Officer failed to do so in a transparent or intelligible manner.

[35] It is true that an Officer need not address each and every piece of documentary evidence before them. 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 to the evidence'" (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, 1998 CanLII 8667 (FC) at para 17). In this case, the Court must infer that the Officer made their decision without regard to the relevant evidence on state protection. As such, the Court finds that this decision is unreasonable.

VI. Conclusion

[36] The application for judicial review is allowed. No question of general importance is certified and none arises.

JUDGMENT in IMM-4749-18

THIS COURT'S JUDGMENT is that the application for judicial review is allowed.

There is no question of general importance for certification and none arises. There is no order as to costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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