Federal Court		Cour fédérale

Date: 20110202

Docket: IMM-1017-10

Citation: 2011 FC 106

Ottawa, Ontario, February 2, 2011

PRESENT: The Honourable Mr. Justice O'Keefe
BETWEEN:

CARLOS HERNAN OLIVEROS RUBIANO

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 (the Act), for judicial review of a decision of a pre-removal risk assessment officer (the officer), dated January 22, 2010, wherein the officer determined that the applicant would not be subject to risk of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Colombia.

[2] The applicant requests an order quashing the decision of the officer and remitting the matter back for redetermination by a different officer in accordance with such directions as the Court considers appropriate.

Background

[3] Carlos Hernan Oliveros Rubiano (the applicant) was born on March 14, 1968 and is a citizen of Colombia.

[4] The applicant was one of the targets of an extortion scheme by the Revolutionary Armed Forces of Colombia (FARC). The applicant states that he and his extended family were often approached for money by the FARC and the United Self-Defence Forces of Colombia (AUC), which they refused to provide. In October 2001, the applicant and his cousins informed the Colombian Army about the attempted extortion. In its response, the Colombian Army killed one of the perpetrators of the extortion attempt. Subsequently, the applicant was detained allegedly by three armed members of FARC who requested banking and personal information about his cousin, Alfonso Cruz, and other businessmen. The applicant worked as assistant manager of operations at the Bank Bilbao Vizcaya Argentaria Colombia. It was because of this position and his access to financial records, that the applicant believes FARC demanded this information from him. In 2002, Alfonso Cruz and two of the applicant's other cousins were murdered. Over the period of several years, the applicant received phone calls continuing to demand financial records and indicating that he knew the consequences of not cooperating with the FARC.

[5] In 2005, the applicant was shot at by two men on a motorcycle while driving a taxi. He went to the Unidad de Reaccion Inmediata de la Fiscalia (URI), the Office of the Public Prosecutor, and filed a report on the incident. He was told that the URI would undertake an investigation.

[6] The applicant and his family fled to Ecuador in September 2005. They did not file for asylum because they found out that they were not able to work or get financial help with accommodation. They returned to Colombia after ten days.

[7] In April 2006, the applicant and his family entered the United States on visitor visas. On April 26, 2006, the applicant sought refugee protection at the Canada/U.S. border. He was prevented from making an application because of the Safe Third Country Agreement. The applicant applied for and was denied refugee protection in the United States. He then entered Canada illegally and attempted to make a refugee claim which was refused.

[8] The applicant filed a pre-removal risk assessment (PRRA) in November 2009. In the PRRA application he requested an oral hearing, which was not afforded to him.

Officer’s Decision

[9] The officer concluded that the applicant had provided insufficient objective evidence to substantiate the risk in his application. The officer found that the applicant does not face a danger of torture, a risk to life, or a risk of cruel and unusual treatment or punishment and is not a person in need of protection.

[10] The officer found that the applicant had not established that he faced an individualized risk. While the applicant's cousins had been murdered, these people were land owners or employees of land owners and there was insufficient evidence that the applicant was similarly situated to these victims. The officer found that the evidence did not show that the applicant was a person of interest to FARC or AUC. The officer did not find that the applicant was similarly situated to those who are actively pursued by FARC or the National Liberation Army (ELN).

[11] The officer gave minimal weight to affidavits submitted by the applicant's mother and cousins. He found that these people had a vested interest in a positive outcome of the hearing for the applicant. He found that these affidavits establish the familial relationship between the applicant and his cousins who were murdered and they restate the occurrences alleged by the applicant but that they are not supported by objective evidence that the applicant is personally at risk of harm in Colombia.

[12] The officer found that the applicant's actions were not consistent with someone who fears for his and his family's life. The applicant fled Colombia for Ecuador to seek asylum but returned to Colombia after ten days. The officer found that Ecuador had a developed refugee protection system.

[13] The officer found that the applicant's mother and brother continue to reside in Colombia and are not victims of harassment, crime or violence.

[14] The officer found that the applicant had not established that the Colombian state was unable or unwilling to protect him. He found that the URI interviewed the applicant regarding the incident

when he was shot at and made a report, indicating that it would investigate. The officer found this was evidence that the authorities in Colombia are willing to assist citizens when approached. The officer found that the applicant did not exhaust all avenues of state protection available to him and did not provide clear and convincing evidence that the state was unable to protect him.

[15] The officer then reviewed the country condition information on Colombia. He found that Colombia is a multiparty democracy which suffers from a sustained internal armed conflict. He found that groups such as FARC and ELN commit numerous human rights abuses. He noted that the courts have been investigating the Colombian Congress members' collaboration with these paramilitaries.

Issues

[16] The applicant submitted the following issues for consideration:

1. The decision of the PRRA officer was on the credibility of the applicant (without the word being explicitly used) and the officer thereby erred in not acceding to the applicant's request for a hearing.

2. The PRRA decision unreasonable in that the officer failed to consider relevant and probative evidence of the risks faced by the applicant, or if such evidence was considered, no explanation was given for rejecting such evidence as probative of the applicant's case.

3. The PRRA officer applied an incorrect standard to his assessment of the availability of state protection to the applicant.

[17] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the PRRA officer err by not holding a hearing pursuant to subsection 113(b) of the Act?

3. Did the officer ignore probative evidence?

4. Did the officer apply the wrong test in assessing the availability of state protection?

Applicant's Written Submissions

[18] The applicant submits that the issue of an oral hearing is a question of procedural fairness and should be assessed on the standard of correctness. For the other issues, the appropriate standard is reasonableness.

[19] The applicant submits that an oral hearing is required when an issue of credibility is central to the decision in question. Although the officer did not state that he explicitly rejected the applicant's credibility, his reference to insufficient objective evidence and the minimal weight given to the applicant's documentary evidence were essentially findings of credibility. Further, the applicant submits that credibility is in issue because the officer questioned the applicant's subjective fear and refused to accord weight to the applicant's story without corroborating evidence. As such, an oral hearing should have been provided.

[20] The applicant submits that the officer failed to consider all the evidence before him. The officer found that the applicant was not similarly situated to the members of his family who were

murdered. He further found that the applicant was not a person of interest to the FARC or AUC. However, both of these issues were discussed in the affidavits from the applicant's mother and cousin. The officer did consider these affidavits and gave them minimal weight because they were prepared by relatives who had a vested interested in the outcome of the proceedings. The applicant submits that the case law has established that the mere fact that evidence is from relatives who want to assist the applicant in the proceedings is not a reason for assigning it minimal weight.

[21] The applicant submits that the officer applied an incorrect standard in his analysis of the availability of state protection. The officer indicated that the applicant did not exhaust all avenues of state protection available to him. The applicant submits that the test is whether the applicant made reasonable efforts to seek state protection. In addition, the applicant submits that simply because the officer found that Colombia is a multiparty democracy, does not mean that it can protect its nationals. The extensive corruption in the Colombian government demonstrates that it cannot provide the same protection as other democratic states. The applicant submits that the officer recited the country conditions of Colombia and stated his conclusion without providing any analysis of how the country conditions affected the applicant's ability to access state protection.

Respondents' Written Submissions

[22] The respondents submit that the applicant failed to establish a personalized risk of harm. The officer reasonably made the following findings which demonstrate the lack of personalized risk: the applicant was in a different profession than those targeted by the FARC, his mother and brother continue to reside in Colombia without issue, the applicant has not proven he is a person of

interest to the FARC and the applicant's profile does not fit that of people commonly targeted by the FARC.

[23] The respondents submit that the officer considered the affidavits of the applicant's mother and cousins and gave them little weight. The officer reviewed the contents of the affidavits but found that they only restated the occurrences alleged by the applicant and outlined his lineage but were not supported by objective evidence. The respondent submits that it is open to an officer to give affidavits little weight when they are self-serving and not from objective sources.

[24] The respondents submit that the applicant did not show that he took reasonable steps to seek state protection. The applicant only approached the URI after three years of harassment and threats and then he left Colombia eleven days after he filed a report with the URI. The respondents submit that the officer's reasons must be read as a whole. While the officer found that the applicant must exhaust all possible avenues of protection, it is evident from the reasons that he was concerned that the applicant had failed to provide clear and convincing evidence of his reasonable efforts to seek state protection.

[25] The respondents submit that the applicant did not establish subjective fear. The officer determined that the applicant's actions were inconsistent with a person who fears for his life. He could have sought asylum in Ecuador but failed to do so.

[26] Finally, the respondents submit that the officer did not err in not providing an oral hearing. In the determination of the PRRA application, an oral hearing is exceptional. The officer did not

find that the applicant lacked credibility; the officer found that the applicant had failed to establish through his documentary evidence that he faced a personalized risk of harm. The officer is permitted to determine the issue of the weight given to the evidence before the issue of credibility. The officer found that even if the applicant's evidence was credible, the applicant had tendered insufficient evidence of probative value to establish a personal risk, so the officer was not obligated to hold an oral hearing.

Analysis and Decision

[27] **Issue 1**

What is the appropriate standard of review?

The standard of review for an ultimate decision on a PRRA is that of reasonableness. However, any issues of procedural fairness will be determined on the correctness standard (see *Wang v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 799, at paragraph 11).

[28] The applicant submits that the decision not to hold an oral hearing is one of procedural fairness. Generally, the right to be heard is an issue of procedural fairness. However, as stated by Mr. Justice Yves de Montigny in *Iboude c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2005 FC 1316 at paragraph 12, paragraph 113(b) of the Act is clear that the Minister is not obligated to grant a hearing. The PRRA officer has the discretion to hold a hearing based on an application of the facts at issue to the factors outlined in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). Thus, this is generally a question of mixed fact and law and should be reviewed on the standard of reasonableness.

[29] Notwithstanding this analysis, in the case at bar, there is no indication that the officer turned his mind to the issue of whether to hold an oral hearing and this could be a breach of procedural fairness. As such, the absence of an oral hearing in this case will be reviewed on the standard of correctness. The other issues raised will be reviewed on the standard of reasonableness.

[30] I wish to first deal with Issue 4.

[31] **Issue 4**

Did the officer apply the wrong test in assessing the availability of state protection?

The applicant submits that the officer erred in law by applying the wrong test for assessing the availability of state protection in Colombia.

[32] In *Ward v. Canada (Minister of Employment and Immigration)*, [1993] 2 S.C.R. 689, the Supreme Court of Canada held that the presumption of state protection may only be rebutted through clear and convincing evidence of the state's inability to provide protection. This evidence may include testimony of similarly situated individuals to the applicant let down by the state protection arrangement or the applicant’s own testimony of the incidents where the state did not provide protection.

[33] The Federal Court of Appeal added to the test in *Ward* above, that where the state is a functioning democracy, the presence of democratic institutions will increase the burden on the claimant to prove that the claimant exhausted “. . . all the courses of action open to him or her” (see

Kadenko v. Canada (Minister of Citizenship and Immigration) (1996), 143 D.L.R. (4th) 532, [1996] F.C.J. No 1376 (QL) (F.C.A.) at paragraph 5).

[34] However, Mr. Justice Michael Kelen held in *Farias v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1035, 75 Imm. L.R. (3d) 31 at paragraph 19 that:

> …recent Federal Court jurisprudence has held that *Kadenko* cannot be interpreted as requiring refugee claimants to exhaust "every conceivable recourse" available to them in order to rebut the presumption of state protection. This is especially true where the state is alleged to be involved in the persecution. For example, in *Chaves*, above, Madam Justice Tremblay-Lamer held at paragraph 15:
>
> > ¶15 In my view, however, [Ward], supra and *Kadenko*, supra, cannot be interpreted to suggest that an individual will be required to exhaust all avenues before the presumption of state protection can be rebutted.... Rather, where agents of the state are themselves the source of the persecution in question, and where the applicant's credibility is not undermined, the applicant can successfully rebut the presumption of state protection without exhausting every conceivable recourse in the country. The very fact that the agents of the state are the alleged perpetrators of persecution undercuts the apparent democratic nature of the state's institutions, and correspondingly, the burden of proof. ...

[35] Likewise, Federal Court jurisprudence has held that democracy alone does not ensure effective state protection (see *Katwaru v. Canada (Minister of Citizenship and Immigration)* 2007 FC 612, at paragraph 21).

[36] The officer in this case stated that "the onus is on the applicant to show that he has exhausted all avenues of redress available to him in his country of nationality." Finally, he reiterated

that, “in the case before me, the applicant has failed to indicate that he has in fact exhausted all avenues available to him in his country of nationality”.

[37] The applicant stated in his PRRA application that he had approached the Colombian Army for assistance with the extortion threats he received from the FARC and AUC. He also submitted that he had filed a report with the URI, the Office of the Public Prosecutor, when he was shot at in a taxicab, allegedly by members of FARC. It is evident that the applicant did approach the authorities for protection on several occasions.

[38] The applicant further submitted documentary evidence that indicated that more than 60 members of the Colombian Congress are under investigation for collaborating with the paramilitaries. Given this level of corruption in the government, the officer’s finding that Colombia is a multiparty democratic state should not necessarily signify that it is able to protect its citizens (see *Gilvaja v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 598, 81 Imm. L.R. (3d) 165 at paragraph 43).

[39] Based on this evidence, the officer erred in law by requiring the applicant to show that he had exhausted all avenues of state protection, as the applicant did establish that he had made reasonable efforts to seek state protection in a state where the authorities are not often able to provide protection to their nationals.

[40] As a result, the application for judicial review must be allowed and the matter is referred to a different officer for redetermination.

[41] Because of my finding on this issue, I need not deal with the other issues.

[42] As a result of my decision, neither party wished to submit a proposed serious question of general importance for my consideration.

JUDGMENT

[43] **IT IS ORDERED that** the application for judicial review must be allowed and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, 2001, c. 27

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97.(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97.(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement

country,	pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit :
. . .	. . .
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

Immigration and Refugee Protection Regulations, SOR/2002-227

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.

FEDERAL COURT

SOLICITORS OF RECORD

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