Federal Court  Cour fédérale

Date: 20110613

Docket: IMM-3324-10

Citation: 2011 FC 681

Ottawa, Ontario, June 13, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

PEDRO MANUEL PAZ OSPINA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Pedro Manuel Paz Ospina applies for judicial review of the May 17, 2010 decision of a Member of the Refugee Protection Division of Immigration and Refugee Board (the RPD) determining that the Applicant was not a Convention refugee and not a person in need of protection.

[2] The Applicant, an auditor from Colombia, claimed persecution by criminals seeking to make him work for their illegal enterprise and provide them with information about another company he had worked for.

[3] The Applicant submits the RPD erred in law in stating that the standard of proof for establishing a well-founded fear of persecution was to be determined on a balance of probabilities, instead of establishing whether there was a reasonable chance that persecution would take place if he were to return to Colombia.

[4] I have concluded that the RPD erred in law by relying on the balance of probabilities test instead of the reasonable chance of persecution test. For that reason, I am granting this application for judicial review.

Facts

[5] Mr. Pedro Manuel Paz Ospina (the Applicant) is a citizen of Colombia from Bogota. He is a professional external auditor for the company Deloitte who was contracted out with a company located in the town of Puerto Tejada. There the Applicant employed a private driver named Herminio Otero (Herminio). In March 2008, Herminio proposed that the Applicant take on private contract work analyzing inventory controls of a supermarket in Puerto Tejada owned by a man named Memo.

[6] The Applicant took on the work but after some time, he came to realize that Herminio and Memo were involved in illegal activities. The Applicant learned that they were extorting money from companies and paying off police, lawyers, and a paramilitary unit. Memo wanted the

Applicant to organize his illegal extortion business and provide information about a company the Applicant had previously audited. The Applicant did not comply with the proposition.

[7] The Applicant returned to Bogota but two to three weeks later in June 2008, began receiving calls on his cell phone from Herminio asking when he would be returning to Puerto Tejada and whether he had the client information Memo wanted. Herminio also visited the Applicant's uncle in Cali, from where the Applicant had been picked up, asking for the Applicant's contact information. The uncle did not provide any information to Herminio and left Cali to avoid further contact.

[8] In August 2008 Herminio called the Applicant one last time, telling him that Memo did not like how the Applicant was evading them. Herminio told the Applicant "you know too much about our business, we are not going to let it go", that they would pay him and that he "had better do these things willing or else." The Applicant decided to go into hiding. As a statutory auditor, the Applicant would have to register at a local chamber of commerce to work, and he believed he would be easy to track.

[9] The Applicant left Colombia and arrived in Canada on a tourist visa on October 5, 2008. He made an inland refugee claim on May 27, 2009.

[10] On May 17, 2010, the Immigration and Refugee Board, Refugee Protection Division (RPD) found that the Applicant was not a Convention refugee, and that he was not a person in need of protection.

Decision Under Review

[11] The RPD recognized that illegal armed groups continue to exist in Colombia. However, the RPD found that the individuals threatening the Applicant did not demonstrate much ability to pursue the Applicant. They only knew the Applicant's cell phone number and his uncle's residence. The RPD noted that the fact that Herminio was asking the uncle for contact information was evidence that Herminio did not know the Applicant's contact details. The uncle had not given any information to Herminio and moved away around mid-August 2008. The only other way in which Herminio attempted to contact the Applicant was through his cell phone.

[12] The RPD also noted that although the Applicant lived in Bogota for four months after declining to cooperate, there was no evidence that the agents of persecution demonstrated motivation or ability to pursue the Applicant during that time.

[13] The Applicant testified there were a number of phone calls to his mother's residence between December 2008 and February 2009 claiming to be from a credit card company or bank and asking for particulars about the Applicant. The family did not provide any information to the callers. The RPD did not accept that the calls were from the agents of persecution or that they demonstrate any serious efforts to locate the Applicant, given that there were no threats made. The RPD found that there was no credible or trustworthy evidence that anyone in Colombia has been approached by the agents of persecution about the Applicant since he has left Colombia over one and a half years ago.

[14] The RPD found that the evidence suggested it was not of concern to the agents of persecution that the Applicant knew about the illegal activities, as they did not act secretive about it. The RPD did take note that Herminio had said in his last phone call "You know too much about our business, we are not going to let you go" but found there was no credible evidence that the agents of persecution did anything to locate or harm the Applicant subsequent to this call, showing that it was not a serious threat.

[15] The RPD concluded its analysis with this paragraph:

> Overall, I find that there is no objective basis to this claim as the evidence before me does not lead me to find, on a balance of probabilities, that the claimant would be pursued by the agent of persecution if he returns to Colombia.

[16] The RPD found that the Applicant was not a Convention refugee, as he did not have a well-founded fear of persecution in Colombia. The RPD also found that he was not a person in need of protection in that his removal to Colombia would not subject him personally to a risk to his life or to a risk of cruel and unusual treatment or punishment.

Legislation

[17] The *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (IRPA) provides:

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	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

social group or political opinion,
(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
(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.

appartenance à un groupe social ou de ses opinions politiques :
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) 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
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
(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 country

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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(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 pas

Issues

[18] The Applicant submits two issues arise:

a. Did the RPD err in stating the standard of proof for establishing a well-founded fear of persecution was to be determined on a balance of probabilities?

b. Did the RPD make unreasonable implausibility findings with respect to the future actions of the Applicant's persecutors?

Standard of Review

[19] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*), the Supreme Court of Canada decided that there were two standards of review, correctness and reasonableness. The standard of review for questions of law was correctness. The standard of review for questions of fact and mixed fact and law was reasonableness: *Dunsmuir* at paras 50 and 53.

[20] Both parties agreed that the issue of the applicable standard of proof, as a question of law, is reviewable on the standard of correctness and the RPD's findings of fact are reviewable on the standard of reasonableness.

Analysis

[21] The Applicant argues that the RPD applied the wrong standard of proof in determining whether there was an objective basis to the Applicant's fear of being returned to Colombia. The standard of proof of the objective test is not a balance of probabilities, but one of a "reasonable chance" or "more than a mere possibility", which need not be more than a 50% chance but is more

than a minimal possibility: *Adjei v Canada (Minister of Employment and Immigration*), [1989] 2 F.C. 680 at para 5 and 8 (*Adjei*).

[22] The Respondent responds that the Applicant confuses the standard of proof for factual findings with the legal test for the objective basis for a well-founded fear of persecution. While the test for an objective basis for a well-founded fear of persecution is one of a "reasonable chance", the standard of proof applicable to finding of facts is a balance of probabilities. *Hinzman v Canada (Minister of Citizenship and Immigration*), 2006 FC 420 at paras 184, aff'd in *Hinzman v Canada (Minister of Citizenship and Immigration*), 2007 FCA 171 (*Hinzman*).

[23] The test for an objective basis for a well-founded fear of persecution is whether there is a "reasonable chance" or "more than a mere possibility" that a claimant faces a prospective risk of persecution. In *Adjei* the Federal Court of appeal stated that the standard was lower than the balance of probabilities at paras 5 and 6:

> It was common ground that the objective test is not so stringent as to require the probability of persecution. In other words, although an applicant has to establish his case of a balance of probabilities, he does not nevertheless have to prove that the persecution would more likely than not.
>
> …
>
> The parties were agreed that one accurate way of describing the requisite test is in terms of 'reasonable chance': is there a reasonable chance that persecution would take place were the applicant returned to his country of origin?

[24] The Federal Court of Appeal in *Ponniah v Canada (Minister of Employment and Immigration)*, [1991] 132 NR 32 at para 9 elaborated on what was meant by the "reasonable chance" standard established in *Adjei*:

> "Good grounds" or "reasonable chance" is defined in *Adjei* as occupying the field between upper and lower limits; it is less than a 50 %chance (i.e., a probability), but more than a minimal or mere possibility. There is no intermediate ground: what falls between the two limits is "good grounds".

[25] I have determined that whether or not the RPD applied the correct test is to be assessed on the standard of correctness.

[26] The Respondent points to case law where applicants similarly challenged the RPD's wording on the grounds that the wrong test was applied:

- In *Hinzman*, the RPD had used the wording "…failed to establish that if deployed to Iraq, he would have engaged, been associated with, or been complicit in military action, condemned by the international community…" The applicants argued that in using the words, "would have", the RPD placed too heavy a burden on them. The Court found that these words related to the standard of proof for factual findings, not the legal test: *Hinzman*, at paras 179-184

- In *Morales*, the RPD had said "there was no persuasive evidence that Rogelio would be able to trace the claimant anywhere in Mexico." The Court found that this referred the absence of reliable evidence (a factual finding) rather than a test of persecution: *Morales v Canada (Minister of Citizenship and Immigration*), 2009 FC 216 at para 13 (*Morales*)

- Similarly in *Sivagurunathan*, the Court found on a reading of the extract as a whole, that the RPD's use of the word "would" did not indicate a misunderstanding of the appropriate legal test, as the RPD's mention of "serious possibility of persecution" in the next paragraph demonstrated that the RPD understood the correct test to be applied: *Sivagurunathan v Canada (Minister of Citizenship and Immigration*), 2005 FC 432 at paras 4-5 (*Sivagurunathan*).

  (emphasis added)

[27] The Respondent argues that the disputed paragraph must be read in the context of the entire decision. The Respondent submits that the RPD was analyzing the evidence before him to determine whether on a balance of probabilities the Applicant had demonstrated the fact that his agents of persecution had the means or motivation to pursue the Applicant if returned to Colombia.

[28] However, in the cases cited by the Respondent, the applicants were trying to show that the RPD's use of the word "would" implied that the RPD had used the wrong standard of proof. In the present case, the RPD expressly used the words "balance of probabilities."

[29] Unlike the cases cited by the Respondent, the RPD does not articulate the correct standard of proof elsewhere in the decision other than in its conclusion. The concluding paragraph is not part of any analysis but is more in the nature of a formulaic recitation of statutory grounds.

[30] Consequently, the disputed paragraph is only part of the RPD's analysis where the RPD discussed the applicable standard of proof as to whether the Applicant has an objective basis for his claim of persecution. In this crucial paragraph, the RPD is clearly assessing the risk to the Applicant, not the assessment of the facts which underlie the basis to the Applicant's claim.

[31] In assessing the Applicant's prospective risk of persecution, the RPD's express reliance on the "balance of probabilities" test instead of the correct standard of proof of a "reasonable chance" or "more than a mere possibility" imposes a higher standard of proof on the Applicant than set out by the Federal Court of Appeal in *Adjei*. This is a reviewable error.

[32] The RPD found the Applicant to be a credible witness. Given the Applicant's evidence of what he considered to be threats, it is impossible to know whether the decision would have been different had the RPD applied the correct standard of "reasonable chance" or "more than a mere possibility" to the risk of persecution.

[33] In *Alam v Canada (Minister of Citizenship and Immigration*), 2005 FC 4 (*Alam*), the Court stated at para 9:

> The case law referred to above shows that where the Board has articulated the gist of the appropriate standard of proof (i.e. the combination of the civil standard with the concept of a "reasonable chance"), this Court has not intervened. On the other hand, where it appears that the Board has elevated the standard of proof, the Court has gone on to consider whether a new hearing is required. Further, if the Court cannot determine what standard of proof was applied, a new hearing may be necessary: Begollari v. Canada (Minister of Citizenship and Immigration), 2004 FC 1340, [2004] F.C.J. 1613 (T.D.) (QL).

[34] Having regard to my conclusion that the RPD erred in applying an incorrect standard of proof to whether the Applicant had an objective basis for a well-founded fear of persecution if he were to return to Colombia, I need not address the issue of whether the RPD made unreasonable implausibility findings with respect to the future actions of the Applicant's persecutors.

Conclusion

[35] The application for judicial review is granted.

[36] The matter is to be returned for re-determination by a differently constituted panel.

[37] I do not certify any question of general importance.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted.

2. The matter is to be returned for re-determination by a differently constituted panel.

3. No question of general importance is certified.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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