Federal Court  Cour fédérale

Date: 20120719

Docket: IMM-8190-11

Citation: 2012 FC 914

Ottawa, Ontario, July 19, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

PEDRO LAINEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of the decision of a pre-removal risk assessment (PRRA) officer (the officer), dated September 26, 2011, rejecting the applicant's PRRA application. The officer's decision was based on the finding 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 returned to Honduras.

[2] The applicant requests that the officer's decision be quashed and the matter be remitted back for redetermination by a differently constituted panel for a new hearing.

Background

[3] The applicant, Pedro Lainez, is a citizen of Honduras. His family operated a cattle business in Honduras. In or around November 1998, the Maras Salvatruchas (MS) gang targeted the applicant's grandfather for extortion, demanding payment of a war tax. The applicant's grandfather initially complied, but the MS gang eventually began demanding higher payments. The applicant's grandfather refused and unsuccessfully sought police protection. On October 8, 2000, the applicant's grandfather was killed for not complying with the MS gang's demands.

[4] The applicant and his sister Elizabeth reported the murder to the police. The police detained some suspects. However, death threats were made against them and the applicant and Elizabeth therefore did not pursue the case. Elizabeth continued making the payments until she could no longer afford to. She discussed the situation with a judge, an ex-brother-in-law. The judge recommended that the family flee. Thus, Elizabeth fled to the United States in 2001.

[5] Thereafter, the applicant and his brothers went to Tegucigalpa to seek protection. One at a time, Elizabeth began sending for her brothers. On April 28, 2003, the applicant was shot at by a man that he recognized as one of the individuals who used to collect the war tax from his grandfather. The applicant did not report this attack to the police. Rather, two days later, he fled Honduras and he arrived in the U.S. the following month.

[6] On September 11, 2008, the applicant went to Canada. He filed a refugee claim on arrival and his refugee hearing was held on January 13, 2011. In a decision dated February 24, 2011, the Refugee Protection Division (RPD) denied the applicant's refugee claim. The RPD found that the applicant was a victim of crime which did not provide a link to a Convention ground and that the risks he feared are risks generally faced by other citizens in Honduras. Leave to judicial review this decision was denied on June 6, 2011.

[7] The applicant filed a PRRA application on July 26, 2011, with written submissions made on August 12, 2011. In his application, the applicant included a psychological report from Dr. Halim B. Bishay of Phoenix Psychological-Vocational and Rehabilitation Services. Based on his assessment, Dr. Bishay stated that the applicant suffered from severe depression and severe anxiety and would be retraumatized and suffer irreparable psychological injury if returned to Honduras.

[8] The applicant also included two letters, with English translations, in his PRRA application. The first letter was written by the applicant's uncle, Rafael Molina Vasquez. Mr. Vasquez explained that, as with the applicant's grandfather, Mr. Vasquez's son Danilo was murdered by criminals because he reported the extortion to the police. Mr. Vasquez warned the applicant not to return to Honduras because criminal organized groups would kill him if he did.

[9] The second letter was written by Santiago De Jesus Puentes, ex-judge of Criminal and Penal Processing of the Judicial Section of Juticalpa, Department of Olancho. Mr. Puentes explained that organized crime was rampant in Honduras with no effective police system. Mr. Puentes stated that he knew the applicant's family and that the grandfather had been murdered when the family refused

to pay the war tax. Mr. Puentes also stated that it was known that members of the gang had searched for the applicant both in his home town and in Tegucigalpa where he lived before leaving Honduras. Should he return, Mr. Puentes stated that those same criminals would surely kill the applicant. Mr. Puentes also explained that he had had to remove himself as judge and had fled in fear of similar criminals. Since his return to Honduras, the threats had begun again and Mr. Puentes feared for his life.

Officer's Decision

[10] The officer issued the decision on September 26, 2011. The reasons were provided in the accompanying notes to file that form part of the decision.

[11] In the decision, the officer individually assessed the documents included in the applicant's PRRA application.

[12] First, the officer noted that the applicant stated in his PRRA submissions that the risk he faced in Honduras was not generalized, but rather personalized. In addition, he characterized his refusal to pay the MS gang as an expression of political opinion. However, the officer found that the applicant did not provide any new information in his PRRA submissions, rather, the events described therein had all been assessed by the RPD. Thus, the officer found that the PRRA submissions did not contain any new information nor did they support the applicant's allegations of risk. As such, the officer concluded that these submissions had little probative value and assigned them little weight.

[13] Secondly, the officer considered the death certificate of Danilo Alberto Molina Avilez, the "Record of Removing a Dead Body", and the letter from the applicant's uncle (Danilo's father). The officer accepted that Mr. Avilez was murdered in February 2009, even though the record of body removal stated that the body was picked up in February 2011. The officer also accepted that that Mr. Avilez was the applicant's cousin and that Mr. Avilez was murdered in a violent manner by members of organized crime.

[14] However, the officer was unable to conclude that the death was connected to the applicant. In support, the officer noted the absence of evidence that Mr. Avilez: worked with the applicant or his grandfather; was connected with the grandfather's business; was murdered by the same people that extorted money from the applicant and his siblings and killed their grandfather; or, that his killers belonged to the MS gang. Thus, the officer concluded that these documents had little probative value and also assigned them little weight.

[15] Thirdly, the officer reviewed the psychological report. The officer noted Dr. Bishay's findings that the applicant suffers from anxiety and depression due to his persecution in Honduras and that he would be retraumatized if returned. The officer accepted that the applicant exhibits some symptoms of anxiety and depression. However, based on a disclaimer in the report, the officer noted that the findings therein were based on the applicant's statements to the psychologist. The officer highlighted that Dr. Bishay had not personally witnessed any of the events. Thus, the officer found that this evidence was hearsay and also granted it little weight.

[16] Fourthly, the officer considered the letter from Mr. Puentes. The officer noted that there was little evidence that the author was indeed a judge. Nevertheless, the officer accepted that the author held a post in the Honduran judiciary system and that he was personally threatened for some reason by some delinquent groups. However, the officer noted that this did not demonstrate personalized risk to the applicant. The officer further noted that there was a lack of information on how the author knew of the risks faced by the applicant. Thus, the officer concluded that the letter only contained hearsay evidence on the applicant's personal situation. As such, the officer found that it had little probative value and granted it little weight.

[17] Based on this review, the officer concluded that the applicant provided insufficient new evidence to support the allegations that he now faces personalized risk on return to Honduras.

[18] The officer then considered general country conditions to determine if the situation in Honduras had changed to a sufficient degree since the RPD's decision. Based on a review of publicly available documents, the officer acknowledged that organized criminality and gang violence remain a serious ongoing issue in Honduras. However, the officer observed that these were general country conditions that apply to all residents.

[19] The officer also noted that there is a presumption that the state is able to protect its citizens. The applicant did not provide objective evidence showing that he was unable to secure state protection in Honduras. The documentary evidence indicated that Honduras has established law enforcement agencies and a functioning judiciary. The government is also making a serious effort to

combat gang violence. Thus, the officer concluded that state protection would be available to the applicant should he encounter problems with the MS gang on his return.

[20] The officer therefore found that there had not been a significant change in country conditions in Honduras since the RPD considered the applicant's case. As such, the officer concluded that the applicant is not a person in need of protection as defined in sections 96 and 97 of the Act. The officer therefore rejected the applicant's PRRA application. This decision was communicated to the applicant on October 27, 2011.

[21] In an order dated November 25, 2011, Mr. Justice Donald Rennie of this Court ordered that the applicant's removal, scheduled for November 28, 2011, be stayed pending a final resolution of this judicial review of the PRRA decision.

Issues

[22] The applicant submits the following points at issue:

1. Did the officer make a perverse finding of fact, without reference to the materials before him, or err in law, when he found both, that the risks faced by the applicant were generalized in Honduras and that he could avail himself of state protection?

2. Did the officer make a perverse finding of fact, without reference to the materials before him, or err in law, when he gave little weight to the psychiatrist's report submitted on the PRRA, because the events described by the applicant to the psychiatrist were self-reported?

[23] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the officer err in granting the psychological report little weight?
3. Did the officer err in the state protection analysis?

Applicant's Written Submissions

[24] The applicant notes that it is implicit in the RPD's decision, which was accepted by the officer, that no state protection is available to him. The applicant submits that the risk of being extorted and murdered by the MS gang if he is unable to pay, coupled with the risk he faces as a person who has already refused to pay and is therefore marked for retribution by the MS gang, is so common that it is a generalized risk in Honduras. The applicant submits that being a national of a country where one faces a generalized risk of being killed in every part of the country is logically inconsistent with being able to avail oneself of state protection. Thus, for the officer to find that the applicant had failed to rebut the presumption of state protection, the officer must have grossly misunderstood the RPD decision or failed to take proper notice of the evidence submitted with the PRRA application.

[25] The applicant submits that the danger of irreparable psychological injury, particularly the "severe depressive episode" reported in the psychological report, is a risk to life. The applicant asks this Court to take judicial notice that suicide is the major cause of death for those suffering from major depression and accounts for 15% to 20% of all deaths in patients with severe mood disorders. The applicant further submits that death caused by mental illness must be considered equal to the

risk of physical illness. Protection should therefore not be denied on the basis that the illness is mental, not physical.

[26] The applicant notes that the officer found that the self-reported events were suspect, even though these same events were accepted as true by the RPD and were adopted by the officer by reference to the RPD decision. The officer also granted the report little weight because Dr. Bishay's only knowledge of the events came from the applicant and therefore Dr. Bishay did not have first-hand knowledge of the risks faced and the events suffered by the applicant.

[27] The applicant submits that the PRRA process and decision are both based on the officer accepting the RPD decision as correct when it was made. The truth of the events that the applicant described to the psychiatrist and to the RPD was confirmed in the RPD's decision. It was therefore absurd for the officer to subsequently grant little weight to Dr. Bishay's report solely on the basis that he relied on the applicant's self-reporting of these events.

Respondent's Written Submissions

[28] The respondent submits that the applicant's critique of the officer's findings on generalized risk and state protection pertain to two separate findings. The officer first assessed the risk faced by the applicant and found it generalized and then considered country conditions and found that state protection would be available to the applicant should he encounter problems. As similar conclusions have been upheld by this Court on several occasions, the respondent submits that the applicant has failed to demonstrate that the officer erred in making these findings.

[29] The respondent submits that the applicant failed to provide clear and convincing evidence to rebut the presumption of state protection. The respondent notes that the applicant did not report the alleged attempt on his life to the police. Moreover, the respondent submits that there was evidence on which the officer could conclude that state protection is available to the applicant, including evidence that Honduras has established law enforcement agencies, a functioning judiciary and was making serious efforts to combat gang violence. Thus, there was no reviewable error.

[30] The respondent also submits that the officer reasonably assigned the psychological report little weight. The respondent highlights that the psychological assessment was based on the applicant's psychological state and his self-reported status. It was not an assessment on whether the applicant experienced certain events in Honduras. As the report was based on a single meeting between the psychologist and the applicant, it was open to the officer to assign it little weight. In so doing, the officer did not make a determination on whether the events themselves were suspect.

[31] Nevertheless, the respondent submits that even if this Court finds that the officer erred in assigning the report little weight, this Court should consider whether the reviewable error affects the decision maker's final decision. Where the error does not impact the ultimate decision, it should not be quashed.

[32] In summary, the respondent submits that the applicant is essentially taking issue with the weight that the officer granted to the evidence. The applicant is asking this Court to reweigh the evidence. This Court should not intervene on that basis. Thus, this application should be dismissed.

Analysis and Decision

[33] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the Court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[34] It is trite law that the standard of review of PRRA decisions is reasonableness (see *Wang v Canada (Minister of Citizenship and Immigration)*, 2010 FC 799, [2010] FCJ No 980 at paragraph 11; and *Aleziri v Canada (Minister of Citizenship and Immigration)*, 2009 FC 38, [2009] FCJ No 52 at paragraph 11). Similarly, issues of state protection and of the weighing, interpretation and assessment of evidence are reviewable on a reasonableness standard (see *Giovani Ipina Ipina v Canada (Minister of Citizenship and Immigration)*, 2011 FC 733, [2011] FCJ No 924 at paragraph 5; and *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045, [2009] FCJ No 1286 at paragraph 38).

[35] In reviewing the officer's decision on the reasonableness standard, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12 at paragraph 59). It is not up to a reviewing Court to substitute its own view of a preferable

outcome, nor is it the function of the reviewing Court to reweigh the evidence (see *Khosa* above, at paragraphs 59 and 61).

[36] **Issue 2**

Did the officer err in granting the psychological report little weight?

The applicant submits that the officer erred in granting the psychological report little weight on the basis that Dr. Bishay's knowledge of the risks events was not first-hand. The applicant notes that the danger of irreparable psychological injury reported therein is a risk to life and that mental illness warrants the same protection as physical illness. Conversely, the respondent submits that the psychological assessment was based on the applicant's psychological state and his self-reported status. It was not an assessment on whether the applicant experienced certain events in Honduras and the officer did not make a determination that the events reported therein were suspect.

[37] In the decision, the officer did note Dr. Bishay's findings that the applicant suffers from anxiety and depression and that he would be retraumatized if returned. However, the officer ultimately made the following finding:

> I accept that the applicant exhibits some symptoms of anxiety and depression. However, I also note that this report is based on the applicant's statements as given to the psychologist. In fact, the report states: "Please note that the information contained in this report are professional opinions based primarily from [sic] the patient's self-reported status and the available battery of psychometric assessments." Dr. Bishay has not personally witnessed any of the events described by the applicant. I find this evidence is hearsay and has little probative value. I assign little weight to this letter. [emphasis added]

[38] Dr. Bishay's described the events that occurred in Honduras in the "Relevant Background History" section of the report. Admittedly, Dr. Bishay did not witness those events and the description of them was based on the applicant's description and on what was written in his Personal Information Form (PIF). However, the report is not limited to a repetition of the applicant's statements. Rather, it provides a medical assessment of the applicant and merely outlines the events that he described as a means of contextualizing the applicant's background. Based on the assessment and observations, Dr. Bishay concluded that:

> Coupled to the incidents of emotional, and psychological abuse committed against him, it is clear that Mr. Lainez has developed symptoms consistent with a trauma diagnosis.

[39] Dr. Bishay also described the results of three psychometric tests conducted on the applicant. Two of these tests, the Beck Depression Inventory and the Beck Anxiety Inventory, were described as widely used and reliable measures of the presence and intensity of depression and anxiety, respectively. These are thus the "battery of psychometric assessments" that Dr. Bishay relied on in conjunction with the "patient's self-reported status", in reaching the conclusions reported in the psychological report.

[40] Generally, the weight assigned to medical evidence is a task assigned to the officer and does not raise a serious issue where the officer makes accurate observations of the reported treatment (see *Padda v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1081, [2003] FCJ No 1353 at paragraph 12). However, in *Begashaw v Canada (Minister of Citizenship and Immigration)*, 2009 FC 462, [2009] FCJ No 1058, a case that concerned a stay of removal, Mr. Justice Michel Shore

also acknowledged the accepted jurisprudence of this Court that "a non-expert decision-maker errs when she rejects expert psychological evidence without basis" (at paragraph 46).

[41] As mentioned above, the officer granted the psychological report little weight because the events described therein were not based on Dr. Bishay's first-hand knowledge. However, Dr. Bishay clearly included the events as described by the applicant solely for the purpose of provided contextual background. The conclusions are based both on professional observations and on widely used and reliable assessment tests. These findings stress the severity of the applicant's condition, as evidenced by the following concluding paragraphs of the psychological report:

> Given the degree of the patient's trauma and the period with which he has had to ensure such horrific experiences, it is my opinion that should the patient return to Honduras, he would become re-traumatized and suffer from irreparable psychological injury. Furthermore, returning to Honduras would undoubtedly place the patient in a scenario with a very high likelihood of harm, further abuse, and possible death.
>
> It is imperative that we do not underestimate the severity of the patient's current psychological condition. From our psychometric assessments and observations, it is clear that Mr. Lainez is in dire need of psychological intervention. […] [emphasis added]

[42] Based on these medical findings, I find that the officer unreasonably granted the psychological report little weight solely on the basis that the events described therein were not based on Dr. Bishay's first-hand knowledge. The jurisprudence clearly provides that a non-expert decision maker, such as the officer, errs when he or she rejects expert psychological evidence without basis. Relying on the events being hearsay was not a reasonable basis to reject the psychological report or Dr. Bishay's professional findings presented therein. I would therefore allow this judicial review application on this basis.

[43] Because of my finding on this issue, I need not deal with the remaining issue.

[44] The application for judicial review is allowed and the matter is referred to a different officer for redetermination.

[45] The applicant proposed the following question of general importance for my consideration for certification as a serious question of general importance:

> Does a finding of a generalized risk to the applicants include the implicit finding that state protection is not available?

I am not prepared to certify this question as this issue has already been determined by this Court in earlier decisions.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is 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, SC 2001, c 27

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit :
(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8190-11
STYLE OF CAUSE:	PEDRO LAINEZ - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	July 19, 2012

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