Federal Court  Cour fédérale

Date: 20130628

Docket: IMM-9947-12

Citation: 2013 FC 726

Ottawa, Ontario, June 28, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

RICHARD MARSHALL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] A supervisory court reviewing a decision of a tribunal does so with three governing constructs in mind. First, judicial review is not, in the language of the Supreme Court of Canada, a line-by-line search for error. Reasons are to be read as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34, [2013] SCJ No 34 and not every fact or issue must be canvassed: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654. Second, while

perfection in the analysis is not the standard, the reasons are assessed against the criteria of transparency, intelligibility and justification: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. Third, the decision is read with a view to upholding it, not with a view to setting it aside. In consequence, the court may use the record to supplement the reasons to fill in gaps or *lacunae* in the reasoning process where apparent from the record: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708.

[2] In this case there are two omissions in the reasons, each of which is critical to an analysis of a pre-removal risk assessment (PRRA), and neither of which can be saved or remedied by a generous interpretation and application of the three governing principles.

[3] The Officer made no conclusion as to the applicant's credibility and made no conclusion as to the threat or risk the applicant faces under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). While the Officer conducted a detailed analysis of the new evidence tendered, and identified serious problems with respect to the applicant's credibility and the authenticity of the documents tendered by the applicant, there is no conclusion as to whether the applicant's story is accepted as credible or whether the allegations fall within section 97, particularly paragraph 97(1)(b).

[4] While it may be reasonable for the Officer to disbelieve the applicant, that conclusion was not drawn, and no ultimate decision made in respect of the risk or threat. The Court is unable to infer that the Officer reached a conclusion on credibility, in light of the Officer's finding that the

applicant is a victim of crime and fears criminals in Trinidad. This implies that his allegations are believed, at least in part. Otherwise there would have been no state protection analysis required.

[5] The second problem arises in respect of the state protection analysis. The review of the evidence simply does not support the conclusion. These are not gaps in the analysis that can be supplemented by a review of the record or by logical inference. They are essential aspects of the decision making process.

[6] Therefore, I grant this application for judicial review.

Background

[7] The applicant entered Canada in 2004 and unsuccessfully claimed refugee protection. He testified that he had been shot by a policeman, "Robocop," for having broken ranks with a corrupt Muslim organization in Trinidad. Robocop is said to have shot the applicant because he knew too much about the organization's criminal activities. The applicant's claim for refugee protection was dismissed based on the availability of state protection.

[8] Since then, the applicant has had four negative PRRAs. This Court granted his application for judicial review from the first decision. The Minister consented to a redetermination of the second. The Minister further consented to the judicial review of the third decision being granted.

[9] This application relates to the applicant's fourth negative PRRA. On October 18, 2012, Justice O'Keefe granted an order staying the applicant's removal from Canada pending the outcome of this judicial review.

The Officer's Conclusion on Risk

[10] The Officer considered the additional evidence in support of the PRRA application.

[11] First, in accordance with paragraph 113(a) of the *IRPA*, the Officer refused to consider the statutory declaration from Kenny Fletcher, who stated that he heard the 2004 shooting incident and assisted the applicant in reaching safety. The Officer reasonably determined that there was no explanation as to why this evidence would not have been available at the refugee hearing and that it was not "new". Evidence which is not new need not be considered: *Raza v Canada*, 2007 FCA 385, para 13.

[12] The applicant also presented evidence which the Officer considered new. The key evidence before the Officer was:

a. A letter from Sergeant Steve Michael Moss, said to be a police officer, stating that police intelligence indicates that should the applicant return to Trinidad and Tobago he would be in danger. The applicant's assailant is said to be known to the police and presently at large due to corruption in the police force.

b. A letter from Joseph Saunders, said to be the superintendent of the prison service, containing similar information and nearly identical language.

[13] The Officer noted that the previous decision maker had requested verification of these letters. The Commissioner of Police for Trinidad and Tobago replied that "a perusal of our employee's data base reflects that there is no one employed as a police officer or civilian by the name of Michael Moss." The Commissioner of Prisons wrote that "the Prison Service does not now nor at anytime had, a Superintendent of Prisons by the name of Joseph Saunders."

[14] The applicant was interviewed on May 28, 2012 to address credibility concerns arising from this information. The applicant insisted that the letters were authentic. He noted that the first letter was not written by Michael Moss but rather by Steve Michael Moss; therefore the response from the Commissioner of Police related to the wrong person. With regards to Joseph Saunders, the applicant stated that he is retired and may have needed to protect his life. The Officer rejected these explanations. The decision to do so is unassailable.

[15] The applicant claimed to have spoken with Sgt Moss on the phone after Sgt Moss fled to the United States. The applicant did not provide any phone records or a further letter from Sgt Moss to substantiate these allegations, despite stating that he requested a letter. The Officer considered this unbelievable, particularly as eight months had passed since this conversation was said to have taken place.

[16] The applicant showed the Officer numerous threatening text messages on his phone. The applicant stated that he deleted additional voice and text messages. The Officer did not believe that the applicant would have deleted threatening messages in light of his circumstances. Though the

applicant provided a phone number which he states the messages originated from, the Officer noted that there was no evidence as to whom this number belonged.

[17] The applicant stated that he was threatened in Canada in February 2012 and that his tires were slashed in April 2011 by unknown assailants. The Officer was not satisfied that these events took place or that they were connected with his alleged risk in Trinidad and Tobago.

[18] The applicant provided a doctor's report confirming that he has a bullet lodged in his right upper body. The Officer noted that this evidence did not establish when the applicant was shot, or by whom.

[19] The applicant provided several letters and declarations in support of his application. The applicant's cousin, Paul Marshall, wrote that he and his family have been harassed by the applicant's assailant. The Officer assigned this letter "minimal weight" because there were no details regarding the nature of the alleged harassment or how Mr. Marshall knew it was the same individual who had shot the applicant.

[20] The applicant's friend, Kenson King, wrote that the applicant would be killed if he returned and that his cousin had been killed in relation to the 2004 incident. The Officer also gave this "minimal weight" because there was no death certificate to substantiate the allegation or details as to how the alleged murder related to the applicant's shooting.

[21] The statutory declaration from Daniel Lewis stated that the applicant's assailant was at large and that the applicant's safety would not be a police priority, according to "Intelligence and Classified Information." The Officer assigned this "minimal weight" because there was no indication of the writer's position or how he accessed "classified" information. At the oral hearing, the applicant stated that Mr. Lewis is a private investigator. The Officer considered this statement insufficient due to the lack of corroboration.

[22] The applicant submitted a statement from Joseph Saunders. Mr. Saunders also stated that the applicant is in danger, based on "Intelligence and Classified Information". According to Mr. Saunders, the applicant's safety "would in no way be a priority" should he return. The Officer considered this letter to be vague on many crucial points, including the author's position and ability to access "Intelligence and Classified Information." The Officer determined that the letter had little probative value.

[23] Having reviewed the evidence, the Officer concluded:

> Upon review of the evidence before me I find that the applicant fears a criminal and or criminals in Trinidad. The applicant's fear in this case is not linked to race, religion, nationality, political opinion, or membership in a particular social group. I find the applicant is a victim of crime and this does not provide him with a link to a Convention ground.

[24] The Officer concluded that the applicant's allegations were not linked to a Convention ground, as required by section 96. Notably absent, however, is any conclusion on whether the applicant's allegations would fall within section 97. The Officer also found that state protection was

available as "authorities in Trinidad and Tobago, pursue, investigate, charge and prosecute individuals who contravene the laws of the country."

Approach to the Evidence

[25] The Officer's treatment of the evidence and findings of fact are entitled to deference and are reviewable on the standard of reasonableness: *Dunsmuir*, para 47.

[26] The applicant argues that certain findings of fact are perverse and capricious, made without regard to the evidence. The majority of these arguments are without merit. For example, the applicant points to the Officer's comment that the applicant may have been shot in Canada, noting that is was purely speculative and contrary to the evidentiary basis on which a judge of the Court disposed of the stay motion. Closer review of the record indicates that the Officer made no explicit finding on this question and dealt only with state protection.

[27] The Officer had concerns regarding the applicant's credibility. These concerns are reasonable in light of statements from the authorities in Trinidad and Tobago which indicate that certain letters may be inauthentic.

[28] There are problems with the Officer's apparent conclusion that there was insufficient evidence to establish that Robocop is a former police officer. There is an article in the record which

states, "Just days after being freed of a murder charge, former police officer, Selwyn "Robocop" Alexis has been re-arrested…"

[29] The Officer considered this report, but preferred "to give greater weight to the preponderance of the objective evidence" which did not specifically identify Robocop's prior occupation. This may have been reasonable if the other newspaper articles specifically stated that Robocop had never been a member of the police force. However, at best those articles are silent on the subject.

[30] The Officer subsequently writes "…I do find that the applicant presented sufficient objective evidence to establish on a balance of probabilities that Robocop was a former police official." In light of the previous paragraph, it appears that there may be a typographical error in this sentence. It is problematic that the Officer's conclusion on this critical point is ambiguous.

State Protection

[31] The Officer's decision ultimately turns on the question of state protection. This is necessarily the case, as there is no analysis as to whether the applicant's allegations fall within section 97 of the *IRPA*. Despite the above noted frailties in the decision, state protection is an independent basis on which his claim could nevertheless be rejected as claimants will not be persons in need of protection if they are able to avail themselves of the protection of their country. However, the Officer's analysis of state protection falls short of what is required.

[32] The Officer's analysis on this issue includes the following evidence:

a. The president declared a state of emergency from August to December of 2011 due to a sudden spike in killings;

b. There was a perception of police impunity;

c. The police killed suspects during apprehension and custody;

d. The criminal justice system proceeded at a slow pace and investigations were "open-ended";

e. Public confidence in the police force was low due to high crime rates and perceived corruption; and

f. The Police Complaints Authority had a backlog of more than 11,000 complaints.

[33] Other than the recital that Trinidad and Tobago is a democratic state with effective control of its territory, the Officer's analysis contains no examples or indicators of effective policing. The Officer's finding on state protection is disassociated from the analysis that precedes it. I see no line of evidence which supports the conclusion that state protection is adequate.

[34] The Court is unable to supplement the reasoning from the record. In this case, doing so would require this Court to substitute its view of the evidence for that of the Officer. Accordingly, the decision is unreasonable.

Procedural Fairness

[35] As the decision fails to satisfy the requirement of reasonableness, it is not necessary to address the question of procedural fairness. However, some comments are in order.

[36] As previously mentioned, the Officer had evidence that the applicant presented a letter purporting to be from police authorities in Trinidad and Tobago. Should the Officer rely on this document in reaching a negative credibility finding, procedural fairness would, in the circumstances of this case, require disclosure of the outgoing communication between the Canadian High Commission in Port-of-Spain to the Trinidadian authorities. The reason for this follows.

[37] There is a discrepancy in the name of the witness as given by the applicant in his evidence, Steve Michael Moss, and the name referenced by the Commissioner of Police in his reply to the High Commission, Michael Moss. The outgoing communication, should it exist, from the Canadian High Commission may be of assistance to the applicant in responding to the concern that his document is not authentic. For example, it may be that the High Commission provided the authorities with the incorrect name. Simply put, what question was asked of the Commissioner of Police? Did the High Commission ask if Michael Moss had been a member or did it ask if Steve Michal Moss had been a member?

[38] Should an officer accept the authenticity of the documents, such disclosure would not be required. It may also be reasonable for an officer to assess the applicant's credibility without reliance on this contested evidence.

Abuse of Process and Reasonable Apprehension of Bias

[39] Finally, there is no merit in the applicant's bare assertion that the Officer "engaged in a contemptuous disregard and/or an abuse of process" and demonstrated a reasonable apprehension of bias.

[40] The existence of a reviewable error falls far short of establishing contempt or *mala fides*. A reasonable and right minded person would not consider a decision maker biased without some evidence: *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369.

Remedy

[41] I do not accept the applicant's submission that he is entitled to an order directing that the respondent grant him protection. As I have mentioned, there are serious concerns regarding the authenticity of the applicant's evidence and therefore his credibility. These findings of fact are entitled to deference.

[42] The appropriate remedy is that the matter be referred back for redetermination. With the consent of the respondent, this matter is remitted to a PRRA office other than Toronto.

[43] I see no basis for the awarding of costs. While the decision does not adhere to the guidance of this Court in earlier decisions, particularly regarding the out-bound request from the Canadian High Commission in Port-of-Spain to the Trinidadian police in respect of Steve Michael Moss, I do not see this as egregious conduct that would warrant an award under Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The matter is referred back to Citizenship and Immigration Canada for reconsideration before a different Pre-Removal Risk Assessment officer (at an office other than Toronto). There is no question for certification.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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