Federal Court  Cour fédérale

Date: 20180830

Docket: IMM-1695-17

Citation: 2018 FC 872

Ottawa, Ontario, August 30, 2018

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

RENE ALONSO PACHECO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Rene Alonso Pacheco [the Applicant] seeks judicial review of a decision made by Senior Immigration Officer J. Choongh [the Officer] pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. On March 16, 2017, the Officer rejected the Applicant's Pre-Removal Risk Assessment [PRRA] application [the Decision].

[2] The Applicant applied for the PRRA on February 13, 2017, after having his permanent residency revoked and a deportation order issued on January 26, 2017, due to a finding of inadmissibility made by the Immigration Division [ID] arising from a finding of organized criminality.

[3] The Applicant also applied for judicial review of this ID decision which, after having been granted leave, was dismissed on June 13, 2018, by Mr. Justice Locke. Justice Locke in dismissing the matter upheld the ID's determination that the Applicant was inadmissible due to organized criminality: *Pacheco v Canada (Citizenship and Immigration)*, 2018 FC 617 [*Pacheco 2018 FC 617*].

[4] For the reasons that follow, this application is allowed and the matter is returned for redetermination by another PRRA officer.

II. **Factual background**

A. *The Applicant's personal situation*

[5] The Applicant is originally from El Salvador and has lived in Canada since he was six years old. The Applicant became a permanent resident of Canada in 1999. His mother and three sisters live in Canada.

[6] The Applicant has had criminal trouble in the past as summarized by Justice Locke in *Pacheco 2018 FC 617*. While in detention in relation to these criminal charges, the Applicant was interviewed by the Canadian Border Services Agency [CBSA]. It was during this interview

that the Applicant stated that he was a member of the MS-13 (a criminal organization). He also told the CBSA officer that the number 13 tattoo on the back of his left hand was gang-related, he had been beaten for 13 seconds in an initiation rite to MS-13, the size of his clique was 10-20 members, and his clique's territory was in the Jane/Sheppard area of Toronto.

[7] As outlined in *Pacheco 2018 FC 617*, this resulted in the Applicant being reported as inadmissible and the eventual ID hearing at which his permanent residency status was revoked and his deportation ordered as of January 26, 2017.

[8] Following the ID hearing, the Applicant applied for the PRRA that is the subject of the present judicial review.

B. *PRRA submissions*

[9] The PRRA submissions of February 13, 2017, which were before the Officer, included the PRRA Application form and the personal statement of the Applicant regarding his background, his risk, and his fears of returning to El Salvador.

[10] In his personal statement the Applicant says that he is a member of a union and has steady work in construction. Further, he states that he is not a gang member and that he got his tattoos starting at the age of 19, including a number 13 on his hand, which he thought was cool, and a teardrop, to commemorate his birth father's murder in El Salvador. He also points out that none of his criminal charges are related to gangs.

[11] In the PRRA submissions the Applicant expressed fear that he would be in danger in El Salvador as others, just like the Canadian immigration officials, would take his tattoos as evidence of gang membership. As a result, he could be killed, tortured, or thrown in prison where the conditions are so bad that people die. He also stated that police would not provide protection and that gangs may think he is impersonating them and target him.

[12] In the section of the PRRA application under supporting evidence, the following appears to be written “country reports on arrests unlawful killings by police officers arbitrary unlawful detention under life threatening conditions”, “other additional documentation package showing the same conditions law enforcement brutality, corruption, arbitrary arrest + lengthy pre-trial detention and disappearance” and “these will follow in more detail”. Counsel also provided a cover letter with this submission which stated that “[s]upporting documents and arguments will be submitted by February 28 as requested, unless there is an extension until his appeal [of the ID decision] is over.”

[13] No document other that the Applicant’s personal statement appears to have been submitted with the PRRA Application on February 13, 2017.

[14] On February 23, 2017, the Respondent sent a letter to the Applicant advising him that they received his application and stating that it did not include a use of representative form so he should send them one. The Applicant states he does not recall seeing this February 23 letter and notes the Respondent must have received the form, meaning the letter is not correct, given there

is clearly a copy of the February 10, 2017 use of representative form in the Certified Tribunal Record [CTR].

C. *The lack of further PRRA submissions*

[15] The Applicant alleges his counsel provided further material, submissions, and objective documents, on February 28, 2017, as had previously been stated would be done. He provided a copy of these materials in his affidavit of May 15, 2017. The Respondent objects to these materials as they were not before the Officer.

[16] The Applicant was not a witness to the sending of the documents; and, therefore, his statement is hearsay. The Applicant's counsel has declined to swear an affidavit concerning the materials out of concern that this might jeopardize her ability to represent him.

[17] Counsel for the Applicant, through non-sworn documents on file, has stated that as a sole practitioner her fax machine/printer purchased for $149 is not capable of producing a fax log and it is normal for correspondence to sometimes go missing. She says that is not the fault of the Applicant.

[18] After receiving the Respondent's Memorandum, which drew attention to the lack of fax records, lack of an affidavit by the person who sent them, and that the Respondent has a sworn affidavit stating that their fax records and file records have no evidence of the receipt of the February 28th submissions, counsel for the Applicant asked the Court for directions regarding how to address the Respondent's submissions. In response, Prothonotary Milczynksi on June 28,

2017, directed that the "[r]equest is not the proper subject of directions from the Court – counsel is seeking practice advice".

[19] It is clear from the above, and from the Decision, that the February 28, 2017 submissions and accompanying documents were not examined by the Officer in reaching the Decision. They are not part of the CTR.

[20] As a result of the negative PRRA, the Applicant was scheduled to be deported on May 3, 2017. To delay his deportation the Applicant, prior to leave being granted in this matter, brought a motion for a stay of removal which was granted by Madam Justice Mactavish on May 2, 2017.

III. **Decision under review**

[21] In the Decision the Officer provides an overview of the Applicant's background and how the Applicant arrived at the PRRA stage. The Officer specifically notes that the Applicant has been deemed inadmissible to Canada "as a result of being a member of an organized crime group, specifically the MS-13".

[22] The Officer then explicitly states that they will only consider section 97 in conducting the PRRA as the Applicant is described in subsection 112(3) of *IRPA* due to his inadmissibility for organized criminality. For this reason the Officer states that they are tasked with determining whether, if returned to El Salvador, "the [A]pplicant faces a danger of torture, a risk of cruel or unusual treatment or punishment, or a risk to life."

[23] The Officer notes that the risks stated in the Applicant's personal statement provided with his PRRA application on February 13, 2017 are as follows: (1) being mistaken as a gang member and as a result being killed, tortured, or thrown in prison to die from the poor conditions; (2) the crime and lack of police protection; and (3) that gangs may target him if they thought he was trying to impersonate being in a gang.

[24] The Officer observes that supporting submissions were due by February 28, 2017, and "no additional information, submissions or evidence has been provided by the [A]pplicant pertaining to his risk statements."

[25] The Officer then reproduced verbatim the Executive Summary of the United States Department of State 2016 Country Reports on Human Rights Practices-El Salvador [2016 US DOS Report]. It includes mention, as reproduced by the Officer, of there being "widespread corruption; weak rule of law, which contributed to high levels of impunity and government abuse, including unlawful killings by security forces" among a number of different concerns.

[26] The Officer states that based on a review of current country conditions, although issues such as corruption and violence show evidence of ongoing human rights issues in El Salvador, the Applicant, has not provided sufficient objective evidence and has failed to establish an objectively identifiable, and forward looking, personalized risk based on his statements. The Officer likewise concludes that there is insufficient documentary evidence to establish an objectively identifiable risk or to demonstrate anyone in El Salvador has a continued vested interest in the Applicant.

[27] For these reasons, the Officer determined that upon return to El Salvador the Applicant would not face a serious possibility of being personally subjected to a danger, believed to exist on substantial grounds, of torture. The Officer then determined that the Applicant would not be personally subject to a risk to his life or to cruel and unusual treatment or punishment on removal.

IV. **Standard of Review**

[28] The parties and the Court agree that the standard of review for a PRRA decision is reasonableness. The Officer's assessment of the facts is to be accorded great deference by this Court: *Pozos Martinez v Canada (Citizenship and Immigration)*, 2010 FC 31 at para 18.

[29] In conducting a reasonableness review, the Court should concern itself with whether the decision was justified, transparent, intelligible, and within the range of possible acceptable outcomes defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

[30] If the reasons, when read as a whole, "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16.

V. **Issues**

A. *Preliminary Issue*

[31] Regarding the question of the submissions of the Applicant not being received by the Officer and not forming part of the CTR, the submissions are attached to the Applicant's affidavit tendered in this matter. The Respondent objects to the consideration of these submissions as there is no evidence that they were before the Officer.

[32] The Applicant's counsel has no record that the fax was sent and the Respondent has no record of receiving the February 28th fax from counsel.

[33] The onus falls on the Applicant, as the sender, to provide evidence of successful transmission of the submissions by facsimile to the correct fax number for the Respondent. He has been unable to provide any such proof. The Respondent, on the other hand, has verified that their fax equipment and records show no receipt of the Applicant's February 28th submissions.

[34] That the Applicant's counsel's fax machine is apparently not capable of producing the necessary verification that a fax transmission was successfully delivered to a specific number indicates that the method of delivery selected was not the most prudent. Counsel's statement that it is normal for correspondence to sometimes go missing is also concerning.

[35] It is well known that only the information that was before the Officer can be considered on judicial review: *Love v Canada (Privacy Commissioner),* 2015 FCA 198 at para 17. The

failure of the Applicant to prove, on a balance of probabilities, that the submissions were sent to the Respondent, is fatal to his suggestion that the materials were sent to the Officer and were ignored: *Ghaloghlyan v Canada (Citizenship and Immigration)*, 2011 FC 1252 at para 8.

[36] The review of the Decision will be undertaken considering the material that was before the Officer, as contained in the CTR, without reference to the February 28th submissions. It is noted, however, that the submission materials in question have been said to be further documents that were readily available from the Immigration and Refugee Board [IRB] website as part of the standard immigration package for El Salvador.

B. *Issues for Review*

[37] Counsel for the Applicant raised a number of issues, three of which relate to the merits of the PRRA decision. I have slightly reformulated them as follows:

(i) Notwithstanding the failure of the further submissions of the Applicant to reach the Officer, should the Officer have reviewed the IRB documents concerning gang membership and risk as they were clearly stated and set out in the PRRA application?

(ii) Since the Applicant came to Canada as a very young child did the Officer err in requiring him to prove that he faced a personalized forward-looking risk from people in El Salvador?

(iii) Is the Applicant at risk for cruel and unusual punishment or torture if he is returned to El Salvador?

[38] In my view, upon considering the parties' submissions and the underlying record, this application can be resolved by determining whether or not the Decision was reasonable.

VI. **Analysis**

[39] Even without receiving the Applicant's submissions, the Officer had before them the Applicant's outline of the risks which he feared. The Officer referred to those risks, excerpting them as follows:

> **Risks**
>
> The applicant states,
>
> [. . .]
>
> If I go to El Salvador, I will be in danger. Not only the Canadian Immigration agents mistook m(*sic*) tattoos for my being in a gang, but they will also. I understand that if someone arrives in El Salvador with tattoos and they think they are in a gang they can kill them, torture them or immediately threw them in prison were a good percentage of people die each year because of terrible conditions.
>
> My only relatives in El Salvador are my grandmother and cousins. When I lived there when I was a child there was no protection from the police or people shooting at us and robbing us. I understand there is still no protection and that I can be the target of gangs there for trying to impersonate them.
>
> Therefore my life is in danger and I have no hope of being protected. [. . .]
>
> (ellipsis in the original)

A. *Personalized risk*

[40] In this review the Applicant expresses concern that the Officer wanted him to prove that he faced a personalized forward-looking risk and that such a task was impossible as he had not lived in El Salvador since he was a small child.

[41] The Respondent rightly points out that under section 97 the very nature of the risk considered is whether the Applicant would personally be subjected to a danger of torture or risk to their life if removed from Canada to his country of nationality.

[42] The Applicant's tattoo is the catalyst for his perceived risk. That tattoo is a personal characteristic of the Applicant that he fears may result in his death if returned to El Salvador.

B. *Failure to adequately assess the Applicant's profile*

[43] The Applicant submits that the Officer failed to assess his perceived profile from the perspective of those who would engage in persecutory conduct. He also submits that the Officer had the duty to examine recent sources of information on country conditions other than those which were provided by the Applicant: *Rizk Hassaballa v Canada (Citizenship and Immigration)*, 2007 FC 489 at para 33 [*Hassaballa*].

[44] The Respondent notes that the Officer was aware of the Applicant's concern that because of his tattoo he could be killed, tortured or immediately detained. The Respondent says that the Officer reasonably concluded there was insufficient objective evidence that the Applicant faced a personalized risk based on that fear. The Respondent also relies on the Response to Information Request [RIR] SLV 105259.E to say that tattoos are insufficient to cause or support arrest in El Salvador because gang members are set free for not meeting the strict evidentiary requirements of the El Salvadorian justice system.

[45] The RIR, upon which the Respondent relies, is not referred to by the Officer nor is it part of the CTR. The Respondent points out that it was one of the documents in the Applicant's undelivered submissions but, as the Respondent noted, those submissions were never received by the Officer.

[46] The Respondent's analysis of the Applicant's tattoo is one that, had it been provided by the Officer, may have justified the finding that was made about the Applicant's lack of personalized risk. However, given that the underlying record does not contain that RIR, the Court cannot resort to the record to supplement the Officer's reasons. It can only review the actual reasons provided by the Officer and the one country condition document in the CTR.

C. *Further analysis should have been done by the Officer*

[47] The Applicant submits that when considering the nature of the risks that he had alleged it was incumbent on the Officer to look at how the police, government, and gangs in El Salvador were likely to treat him. This was particularly important as he would be returned to El Salvador for being a member of the MS-13 gang, despite his post-interview denials of such membership. The Applicant also contends that in order to properly assess that risk, the whole immigration package from the IRB website ought to have been considered.

[48] In *Hassaballa* Mr. Justice Blais, as he was then, stated that a PRRA officer has both the right and the duty to examine the most recent sources of information when conducting a risk assessment: *Hassaballa,* at para 33 . The PRRA officer is not limited to the material filed by the

applicant. In the Applicant's case, the Officer only reviewed the 2016 US DOS Report, a copy of which is found in the CTR.

[49] As previously stated, under "Country Conditions" the Officer simply set out the entire five paragraphs of the Executive Summary. The Officer then made a short one paragraph finding in which it was acknowledged that "El Salvador continues to face certain human rights violations such as corruption and violence" and concluded that there was not sufficient objective evidence that the Applicant would face a personalized forward-looking risk and, he had failed to establish an objectively identifiable risk.

[50] The Officer's very brief statement that there is "corruption and violence" does not begin to do the US DOS Report justice. The very first page after the Executive Summary is entitled "Arbitrary Deprivation of Life and Other Unlawful Politically Motivated Killings". It mentions the close range killing of four unarmed gang members and cites a nongovernmental organization [NGO] statistic that through July 2016 there were 366 armed confrontations during which 350 suspected gang members died. It states that in 2015 there were 359 suspected gang members killed.

[51] The third page of the 2016 US DOS report refers to other NGOs reporting under the heading "Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment" that:

> [P]oor male youths were sometimes targeted by the PNC and armed forces because they fit the stereotype of gang members. Other credible sources indicated that youths suspected to have knowledge of gang activity were mistreated by law enforcement personnel.

[52] This reference appears to support the Applicant's concern that mere suspicion of gang membership may be sufficient to be killed, tortured or thrown in prison. It ought to have been addressed by the Officer in assessing the Applicant's risk.

[53] The 2016 US DOS report goes on to discuss that there were severely overcrowded prisons: 34,938 inmates held in facilities with the capacity of 10,035 inmates. Criminal activities by gangs in prisons was said to remain a serious problem. To try to curb this problem, inmates in prisons designated for convicted gang members were subjected to isolation and restricted to their cells for 24 hours per day. This affected 13,162 inmates housed in seven prisons.

[54] The Officer did not mention any of this evidence. The Officer did not discuss the Applicant's tattoos. The Officer did not really say anything other than to state the conclusion that the Applicant had failed to establish an objectively identifiable risk.

[55] Perhaps because there were no substantive submissions before the Officer, other than the personal statement of the Applicant, it was felt that a relatively cursory examination of the risks identified by the Applicant would suffice. If so, that is not in keeping with the jurisprudence of the Court. In *Jama v Canada (Citizenship and Immigration)*, 2014 FC 668 Mr. Justice de Montigny, then a member of this Court, elaborated on the nature of a PRRA officer's duty:

> [17] It is trite law that the PRRA engages the state's independent and fundamental obligation not to *refoule* individuals to torture, persecution and other impermissible outcomes. [. . .] As a result, a PRRA officer cannot confine or exhaust its analysis to the exact arguments raised by an applicant or even to the exact evidence presented.
>
> [18] For example, officers have a duty to consult recently and publicly available reports on country conditions even when they

> have not been submitted by the Applicants. [. . .] if PRRA officers' findings are to attract deference from this Court on judicial review, the Court must be satisfied that the PRRA officer's expertise is based on meaningful research and an intimate familiarity with the current country conditions in the applicant's country of removal.
>
> [19] It is also incumbent on PRRA officers to consider risk grounds that are apparent on the record, even if these are not specifically raised by the applicant.

[56] Without a more fulsome analysis by the Officer, it is not possible to discern what the Officer considered prior to making the finding. It would have been helpful for the Officer to have indicated the process by which they arrived at the Decision. For example, the Officer could have indicated what evidence, including from the country condition documents, was accepted. Was anything specifically rejected? What portions of the 2016 US DOS Report, other than the Executive Summary, were considered? Did the Officer believe the Applicant was a gang member or not? Did it matter to the Officer? Why did the Officer consider one country condition report to be sufficient when the Respondent himself points to information in the RIR that appears to be directly relevant to the Applicant's alleged risk?

[57] It may not have been necessary for the Officer to address all of these questions but certainly some analysis setting out why the Applicant should be returned to El Salvador was necessary given the alleged MS-13 affiliation that was raised as a personal risk to the Applicant.

[58] As it is, the Court is left without knowing why the Officer made the Decision. The result is that the Decision is neither transparent nor intelligible. Without further explanation, it is not possible to determine whether the Officer's conclusion is within the range of possible, acceptable outcomes, which are defensible on the facts and law.

VII. **Summary**

[59] The personalized risk that was put forward by the Applicant was very briefly mentioned by the Officer, but it was not fully considered. The Applicant's claim was that because of his tattoo and the grounds for his inadmissibility finding, he would be perceived to be a member of the MS-13 gang from which life-threatening consequences would flow.

[60] The Officer clearly was aware of the Applicant's concerns about the authorities and the gangs in El Salvador. The Executive Summary excerpted by the Officer included a reference to unlawful killings by security forces. There is no discussion of the rest of the 2016 US DOS Report which, on the page, after the section reproduced by the Officer, specifically outlines that these unlawful killings are in relation to gang members.

[61] This evidence, which was referred to in part by the Officer, was important to the analysis of the Applicant's alleged risk. The lack of reference to it suggests the Officer may have made an erroneous finding of fact and reached a decision without regard to the evidence, thereby rendering the decision unreasonable on that basis: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35.

[62] This finding that the Decision is unreasonable should not be taken as a statement or an implication that the Court agrees or disagrees with the position regarding risk of either the Applicant or the Respondent. It is simply a determination that the Officer may have overlooked important evidence and the reasons are not fulsome enough to permit the Court to have confidence in the outcome. A redetermination by another PRRA officer is therefore required.

JUDGMENT IN IMM-1695-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed; the Decision is set aside; and the matter is to be remitted to a different PRRA officer for redetermination.
2. The parties shall be allowed to file further materials at the time of the redetermination.
3. There is no serious question of general importance arising on these facts.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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