Federal Court  Cour fédérale

Date: 20211222

Docket: IMM-5006-20

Citation: 2021 FC 1457

Ottawa, Ontario, December 22, 2021

PRESENT: Mr. Justice Norris

BETWEEN:

GUILANE DONARUS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a citizen of Haiti who has been granted refugee protection in Mexico but who does not wish to return there because, he contends, he is at risk there. Facing removal from Canada, the applicant applied for a risk assessment under subsection 115(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). A Senior Immigration Officer refused the application in a decision dated April 17, 2020. The applicant now seeks judicial review of this

decision under subsection 72(1) of the *IRPA*. He submits that the decision was made in a procedurally unfair way and that it is unreasonable. For the reasons that follow, I do not agree. This application must, therefore, be dismissed.

II. BACKGROUND

[2] The applicant has a complex immigration history. He was born in Haiti in October 1968. He first left Haiti in 1998 and made a claim for asylum in the United States. That claim was eventually rejected. While living in the United States, the applicant married a US citizen and the two had a child together. Fearing that he would be deported to Haiti after his asylum claim was rejected, the applicant entered Canada in 2002 and sought refugee protection here. However, after his wife fell ill, the applicant returned to the United States to care for her and their child. His refugee claim in Canada was eventually declared abandoned in 2003.

[3] Between 2003 and 2008, the applicant was detained in the United States, deported to Haiti, and fled to Mexico on two separate occasions. He was eventually able to secure refugee protection in Mexico in 2008. The applicant was granted permanent residence in Mexico in June 2011. The applicant's brother Serge had also been recognized as a Convention refugee by Mexico. For a time, the two lived in neighboring apartments in Mexico City.

[4] The applicant left Mexico for the United States in or around May 2012 and reunited with his wife and child. In 2013, the applicant and his wife had a second child. The applicant was able to obtain temporary status and a work permit in the United States but he could not secure permanent legal status there. Fearing that he would be deported to Haiti yet again, the applicant

entered Canada in February 2017 and submitted another claim for refugee protection. That claim was rejected because of the 2003 determination regarding his first claim; however, the applicant was offered the opportunity to apply for a pre-removal risk assessment ("PRRA").

[5] The PRRA application was refused on May 16, 2017. Significantly, the applicant's risk was assessed with reference to Haiti, his country of nationality. There was no consideration of any risks the applicant could face in Mexico.

[6] The applicant applied for and was granted leave to proceed with judicial review of the negative PRRA decision; however, this application was discontinued in October 2017.

[7] Subsection 115(1) of the *IRPA* precludes the removal of any person recognized as a Convention refugee to a country where that person "would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment." In light of the fact that the applicant had been recognized as a Convention refugee by Mexico and has permanent resident status there, he was offered the opportunity to submit a PRRA application under this provision.

[8] With the assistance of counsel who continues to represent him on the present application for judicial review, the applicant submitted a second PRRA application on December 8, 2017. The focus of the application was the risks he alleged he would face if he were removed to Mexico. The applicant provided the first set of supporting documentation on December 27, 2017. After being granted extensions of time to complete the application, on or

about May 11, 2018, the applicant provided the balance of his supporting documentation along with the submissions of his counsel.

[9] The second PRRA application was refused by a Senior Immigration Officer in a decision dated April 17, 2020.

[10] In the meantime, without the assistance of his present counsel, on or about June 12, 2019, the applicant submitted an application for permanent residence on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *IRPA*. As will be discussed below, the same Senior Immigration Officer decided both applications. The H&C application was also refused.

[11] The PRRA and H&C decisions were provided to the applicant on or about October 1, 2020. The applicant has not taken any steps to challenge the H&C decision.

III. DECISION UNDER REVIEW

[12] The applicant's PRRA application rested on two key allegations: first, as a Black man from Haiti, the applicant was at risk of discrimination in Mexico amounting to persecution; and second, the applicant was also at risk because he was at risk of forcible recruitment by criminal gangs. The principal focus of the applicant's submissions was section 96 of the *IRPA* but he contended that he was also a person in need of protection under section 97 of the *IRPA* for the same reasons. The Officer was not persuaded that the applicant was at risk in either respect.

[13] First, the Officer found that the applicant did not establish that he was at risk due to discrimination and racism because he failed to show that state protection in Mexico was unavailable to him. Specifically, the Officer found as follows:

- The applicant described an incident in which his landlords in Mexico City verbally and physically assaulted him in 2010. He stated he reported this incident to the police (although he did not provide any corroborating documentation). He also reported the incident to the Human Rights Commission in Mexico and the National Council to Prevent Discrimination in Mexico ("National Council"). The applicant provided a copy of the Notification of Resolution of Complaint from the National Council. While the National Council's remedial powers were limited (it could only attempt reconciliation between the parties and request that the offending parties cease their racist conduct), it did resolve the complaint in the applicant's favour. The National Council also referred the complaint for further action by the Head of the Office of the Director General of Human Rights of the Office of the Attorney General of Justice of the Federal District. The applicant presented no evidence of what happened subsequently.

- The applicant contended that he would be unable to obtain employment because of racial discrimination, citing his inability to find employment previously in Mexico. The Officer noted that in his H&C application the applicant stated that he had worked as a teacher in Mexico. The Officer also noted that objective documentary evidence suggested that there are opportunities available in a variety of industries for Haitians in Mexico. The Officer was therefore "not persuaded" that the applicant would be unable to secure employment should he return to Mexico.

- The Officer noted that in its "Concluding observations on the combined eighteenth to twenty-first periodic reports of Mexico" dated September 19, 2019, the United Nations Committee on the Elimination of Racial Discrimination had commended Mexico for the progress it had made in combating racial discrimination, although continued efforts were still required. On the basis of the report, the Officer found that Mexico "has taken measures to ensure that manifestations of racism and racial discrimination will not be tolerated, including steps to improve legislation and protect and promote the rights of ethnic minorities, specifically those of African descent."

- The applicant had failed to rebut the presumption that state protection would be available in Mexico.

- On the basis of the foregoing, the Officer concluded that, "should the applicant have concerns in Mexico," there are state mechanisms in place there to address those concerns.

[14] Further, the Officer was not persuaded that the applicant would be at risk due to his refusal to be recruited into a criminal gang.

[15] The applicant had recounted that after the incident with his landlords in Mexico City, he moved to the nearby municipality of Aculco. There, his neighbour, Carlos Roberto, attempted to recruit the applicant into his gang, which was associated with a drug cartel. When the applicant refused because, on religious grounds, he does not believe in drugs, Carlos and four of his associates beat up the applicant. The applicant sought medical treatment but did not report the

incident to the police out of fear that the police were involved with the drug cartels. After this incident, in May 2012 the applicant decided to leave Mexico for the United States.

[16] In support of his application, the applicant provided a letter from his brother Serge to corroborate his evidence about this incident.

[17] The Officer gave little weight to the evidence concerning this incident. This conclusion was based on two key findings: first, the statements about the incident from the applicant and his brother were vague and lacked important details; and second, there was a material inconsistency between the applicant's statement and his brother's. The Officer explained both findings with specific references to the evidence. In view of this overall assessment of the evidence concerning this incident, the Officer was "not persuaded that the applicant is personally at risk at the hands of Carlos or any other gang member or gang in Mexico."

[18] In summary, while the Officer acknowledged that the applicant could experience some discrimination due to his ethnicity, even viewed cumulatively, this would not amount to persecution. Further, the applicant had failed to rebut the presumption of state protection. Accordingly, the Officer concluded that the applicant was not at risk within the meaning of either section 96 or 97 of the *IRPA*. The application for protection under subsection 115(2) of the *IRPA* was therefore refused.

IV. STANDARD OF REVIEW

[19] As noted, the applicant challenges both the fairness of the procedure followed by the Officer and the substance of the PRRA decision. There is no dispute about the standard of review that applies to each of these issues.

[20] To determine whether the requirements of procedural fairness were met, the reviewing court must conduct its own analysis of the process followed by the decision maker and determine for itself whether that process was fair having regard to all the relevant circumstances, including those identified in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 21 to 28: see *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54, and *Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31. This is functionally the same as applying the correctness standard of review: see *Canadian Pacific Railway Co* at paras 49-56 and *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35. The burden is on the applicant to demonstrate that the requirements of procedural fairness were not met.

[21] On the other hand, the substance of the Officer's decision is reviewed on a reasonableness standard: see *Demesa v Canada (Citizenship and Immigration)*, 2020 FC 135 at paras 9-10. Reasonableness review, which is "methodologically distinct" from correctness review, is "informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court" (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 12). Accordingly, in reviewing

the reasonableness of a decision, it is not the court's role to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances (*Vavilov* at para 125). At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review (*Vavilov* at para 13).

[22] Reasonableness review is concerned with both the decision maker's reasoning process (as reflected in the reasons given for the decision) and the outcome: see *Vavilov* at paras 83-86. A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). Thus, to determine whether a decision is reasonable, "the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

[23] The burden is on the applicant to demonstrate that the Officer's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). See also *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at paras 12-13.

V. ANALYSIS

A. *Was there a breach of procedural fairness?*

[24] The applicant submits that the requirements of procedural fairness were breached in four ways. First, by notifying the applicant that a decision had been made on his PRRA application long before he would be informed of the result, Immigration, Refugees and Citizenship Canada ("IRCC") arbitrarily deprived him of the opportunity to provide further submissions and evidence in support of his application. Second, the Officer who refused the PRRA application breached the requirements of procedural fairness by relying on extrinsic evidence without notice to the applicant. Third, the Officer also breached the requirements of procedural fairness by using that evidence to draw an adverse inference about the applicant's credibility without first giving the applicant an opportunity to address the Officer's concerns. And fourth, the Officer made adverse credibility findings regarding other aspects of the evidence without first giving the applicant an opportunity to address the Officer's concerns.

[25] In my view, the applicant has not demonstrated that the decision-making process is flawed in any of these respects.

[26] Looking first at the timing of the decision on the risk assessment, some additional background is necessary.

[27] As set out above, the applicant completed his submissions in support of his second PRRA application on or about May 11, 2018. While IRCC is responsible for making the

decision on a PRRA application, the practice is for the Canada Border Services Agency ("CBSA") to deliver the decision to an applicant in person. Thus, in the present case, by letter dated May 6, 2020, the CBSA informed the applicant that IRCC had rendered a decision on his application, although it did not say what the decision was. The letter went on to explain that an appointment would be scheduled to deliver the decision to the applicant in person. However, due to "current circumstances," the CBSA was not scheduling appointments at that time. The letter stated: "When it is safe to do so, you will be contacted by CBSA and an appointment will be scheduled." While the letter does not say so explicitly, there is no issue that the "current circumstances" referred to are the onset of the COVID-19 pandemic and the public health measures that had been put in place as a result. (A letter dated June 12, 2020, with identical wording was also sent to the applicant.) The PRRA decision was finally delivered to the applicant in person on or about October 1, 2020. The decision itself was dated April 17, 2020.

[28] As I understand his argument, the applicant submits that his right to procedural fairness was breached because the first lockdown in Ontario (which began in roughly mid-March 2020) prevented his counsel from providing updated evidence and submissions on the impact of the pandemic in Mexico and then any such updating was forestalled by the delivery of the notification letter in early May 2020.

[29] The applicant's argument faces two insurmountable hurdles. First, the applicant accepts that his right to procedural fairness entails that the Officer only had to consider additional evidence and submissions if they were submitted prior to the applicant's receipt of the May 6, 2020, notification letter: see *Chudal v Canada (Citizenship and Immigration),*

2005 FC 1073 at para 19. The applicant did not provide any such submissions or evidence before that date. Even accepting that at this time his counsel's ability to work (like almost everyone else's) was affected by the public health measures in place at the time, there is no evidence that the applicant had any intention of making further submissions before he received the notification letter. Second, assuming for the sake of argument that at some point the applicant decided to provide new evidence and make further submissions (a very generous assumption given the state of the record on this application), he did not even attempt to take advantage of the mechanism available for this very purpose – namely, a request for reconsideration of the negative decision on the basis of new evidence. (See the section headed "Requests for reconsideration of a negative decision" in IRCC's document "Processing PRRA applications: PRRA decisions", accessible online at: Processing PRRA applications: PRRA decisions - Canada.ca). In these circumstances, there is no merit to the applicant's first procedural fairness argument.

[30] The applicant's next two arguments relating to procedural fairness are interconnected. Once again, some additional background is necessary.

[31] In an affidavit supporting his risk assessment application, the applicant stated that when he lived in Mexico he "could not obtain employment." He explained: "Each time I tried to apply they would look at me and say that the position was no longer available." According to the applicant, this demonstrated the sort of discrimination he had experienced in Mexico as a Black man of Haitian nationality and which, he contended, he would be subjected to again if he returned to Mexico.

[32] As noted above, while the decision on his risk assessment application was pending, the applicant submitted an application for permanent residence on H&C grounds. In that application, however, the applicant stated that he had been employed as a French teacher at the Jose Malia school in Mexico City from "2009-04" to "2017-04" (as typed on the form).

[33] The decision on the applicant's H&C application is not included in the record on this application for judicial review. It was, however, included in the applicant's Motion Record when he applied (successfully) for an order staying his removal from Canada pending the final disposition of the present judicial review application. The H&C decision is dated April 21, 2020 – that is, four days later than the PRRA decision. Like the PRRA decision, the H&C decision was made by "LC, Senior Immigration Officer." There does not appear to be any issue that both applications were dealt with by the same decision maker.

[34] In his PRRA application, the applicant submitted that if he returned to Mexico he would face discrimination amounting to persecution. In support of this argument, he cited, among other things, the difficulties he had had finding work there because of racial discrimination. In assessing this submission, the Officer noted the applicant's statement in his PRRA application that when he lived in Mexico he had not been able to find work. The Officer also noted the information in the H&C application that the applicant had worked as a French teacher in Mexico for eight years – that is, from April 2009 until April 2017. As well, the Officer considered country condition evidence concerning the economic circumstances of Haitians in Mexico. The Officer then drew the following conclusion:

> Overall, I find that the objective documentary evidence suggests that there are opportunities in a variety of industries for Haitians in

> Mexico. The applicant also submits evidence which indicates he was a French Teacher in Mexico for (eight) 8 years, which does not speak to his inability to obtain employment due to discrimination in Mexico. I am therefore not persuaded that the applicant would not be able to secure employment should he return to Mexico.

[35] As noted, the applicant objects to the Officer's reliance on the information from the H&C application on two grounds: it is extrinsic evidence and it gave rise to an adverse credibility finding. There is no merit to either objection.

[36] To begin with, it is well-established that when PRRA and H&C applications are considered by the same decision maker in close succession, the decision on each is to be based on the totality of the evidence contained in both applications: see *Sosi v Canada (Citizenship and Immigration)*, 2008 FC 1300 at para 12; *Durrant v Canada (Citizenship and Immigration)*, 2010 FC 329 at paras 21, 32–33; *Giron v Canada (Citizenship and Immigration)*, 2013 FC 114 at paras 14–15; *Denis v Canada (Citizenship and Immigration)*, 2015 FC 65 at paras 38–47; and *Abdinur v Canada (Citizenship and Immigration)*, 2020 FC 880 at para 13. Thus, I cannot agree with the applicant that the information in his H&C application was "extrinsic" to his PRRA application in any meaningful sense. In fact, it could well be a reviewable error for a decision maker responsible for deciding both a PRRA application and an H&C application to ignore relevant evidence submitted in connection with one application when deciding the other: see *Rannatshe v Canada (Citizenship and Immigration)*, 2021 FC 1377 at paras 18-20.

[37] Further, I do not agree that the Officer relied on the information from the H&C application to draw an adverse conclusion about the applicant's credibility. Importantly

(and understandably), the applicant does not suggest that the information in his H&C application that he worked as a French teacher in Mexico is incorrect (although he does point out, correctly in my view, that the Officer should have realized that there was a typographical error on the form and that it should have said that the applicant worked as a teacher from April 2009 until April 2012, which according to other information on the form and in the PRRA application was when the applicant left Mexico for the United States, and not April 2017). Thus, in my view, it was open to the Officer to conclude on the totality of the evidence that while the applicant did have trouble finding work in Mexico, in the end he was able to do so and, as a result, the evidence he presented was insufficient to establish that, because of racial discrimination, he would be unable to find work if he were to return to Mexico. Given the evidence before the Officer, drawing this conclusion does not require any sort of adverse finding about the applicant's credibility.

[38] The applicant relies on *Abdinur* in support of his argument but that case is distinguishable because the decision maker there did make an adverse credibility finding on the basis of discrepancies in the information in the PRRA and H&C applications: see, in particular, the discussion at paras 26-38 of *Abdinur*.

[39] Not having made an adverse finding about the applicant's credibility in this case, the Officer was not required to alert the applicant to any issues arising from the information he provided about his employment history in the PRRA and H&C applications.

[40] Turning, finally, to the applicant's fourth procedural fairness argument, there is no merit to the submission that the Officer made adverse credibility findings concerning the incident with the applicant's landlords in Mexico or concerning the incident involving Carlos, the gang leader. The Officer's findings in relation to this evidence clearly related to the insufficiency of the applicant's evidence and not its credibility.

[41] For these reasons, the applicant has not established that the requirements of procedural fairness were breached.

B. *Is the decision unreasonable?*

[42] The applicant challenges the reasonableness of the Officer's decision on two related grounds: first, the Officer ignored or misapprehended relevant evidence; and second, the state protection analysis is flawed because the Officer failed to consider the effectiveness of the measures in place in Mexico.

[43] There is no merit to either objection. Both relate primarily to the Officer's reliance on the 2019 report concerning Mexico of the UN Committee on the Elimination of Racial Discrimination mentioned above ("2019 Report"). This report, which post-dates the applicant's final PRRA submissions, was consulted by the Officer as part of a review of current country condition documentation. The applicant contends that the Officer made selective use of this report, relying on positive comments about Mexico's progress in combatting racial discrimination while ignoring negative aspects of the report. In particular, the applicant argues that the Officer failed to consider the following two passages in the 2019 Report:

> 12. The Committee is concerned that, despite the efforts that have been made, the National Council for the Prevention of Discrimination does not have the financial, human and technical resources to respond effectively to all cases of racial discrimination in the State party. In addition, most of the State party's federative entities do not have an institution responsible for the prevention and elimination of racial discrimination (art. 2).
>
> [. . .]
>
> 14. Although the Committee takes note of the implementation of the National Programme for Equality and Non-Discrimination, it is concerned that structural and historical racial discrimination against indigenous peoples and the Mexican population of African descent continues to be deeply rooted and is an obstacle to the construction of a multicultural society based on equality and fairness (arts. 2 and 7).

[44] These passages are certainly relevant to the issues the applicant raised in his PRRA application. So, too, are the recommendations that follow (in, respectively, paragraphs 13 and 15 of the report). While it may have been preferable for the Officer to have adverted to these passages expressly in the decision, the failure to do so does not entail that they were ignored or misapprehended. It is to be presumed that the Officer took all the evidence into account unless the contrary is shown: see *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) (QL); *Jorfi v Canada (Citizenship and Immigration),* 2014 FC 365 at para 31; and *Jama v Canada (Public Safety and Emergency Preparedness),* 2019 FC 1459 at para 17. It is "only when an administrative decision maker is silent on evidence clearly pointing to an opposite conclusion that the Court may intervene and infer that the decision maker overlooked the contradictory evidence when making findings of fact" (*Burai v Canada (Citizenship and Immigration),* 2020 FC 966 at para 38).

[45] In the present case, the applicant has not provided any reason to think that the Officer ignored the information in the 2019 Report. On the contrary, the Officer expressly noted in the decision that the UN Committee "acknowledged the need for continued efforts" by Mexico to combat racial discrimination. This can only be read as a reference to the passages in question. As well, these passages are entirely consistent with the Officer's conclusion that while Mexico has made progress in combatting racial discrimination, work still needs to be done. Thus, the applicant has not demonstrated that the Officer fundamentally misapprehended or failed to account for the evidence before him or her: cf. *Vavilov* at para 126.

[46] Moreover, as the Supreme Court of Canada has emphasized, a critical question in this regard is whether the decision maker has failed to "meaningfully grapple" with a key issue or central argument in the case. When this happens, this "may call into question whether the decision maker was actually alert and sensitive to the matter before it" (*Vavilov* at para 128). In my view, despite not mentioning the passages from the 2019 Report cited by the applicant, it is clear that the Officer grasped the key issues and central arguments advanced by the applicant in his PRRA application, grappled with them meaningfully, and reached a tenable decision. The fact that these passages are not mentioned expressly in the decision does not call the overall reasonableness of the decision into question.

[47] Finally, I do not agree with the applicant that the Officer considered only the efforts that were being made to address racial discrimination as opposed to their effectiveness in determining that the applicant had not rebutted the presumption of state protection. It is clear from the decision that the Officer understood this distinction and assessed the evidence relating to state

protection accordingly: see *Giraldo v Canada (Citizenship and Immigration)*, 2020 FC 1052 at para 14. The overall weighing of the evidence bearing on risk to the applicant in Mexico and the availability of effective recourse was the Officer's responsibility. Absent an unreasonable determination by the Officer – and none have been demonstrated – it is not for a reviewing Court to interfere with that weighing.

VI. CONCLUSION

[48] For these reasons, the application for judicial review is dismissed.

[49] Neither party suggested any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-5006-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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