Federal Court Cour fédérale

Date: 20121218

Docket: IMM-544-12

Citation: 2012 FC 1490

Ottawa, Ontario, December 18, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

LUIS CARLOS HERRERA ANDRADE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a citizen of Columbia. In the present application for judicial review he seeks to set aside the decision of the Refugee Protection Division of the Immigration and Refugee Board [the IRB or the Board], made on December 12, 2011, in which the Board found that the applicant was neither a Convention refugee nor person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act or the IRPA].

[2] The Board premised its decision on two grounds, finding, first, that the applicant lacked credibility and, second, that he had not rebutted the presumption that there was adequate state protection available to him in Columbia. While the applicant challenges both of these findings, it is only necessary for me to address the Board's state protection finding as it is dispositive of this application.

[3] In making its state protection finding, the Board noted that the applicant had not sought the assistance of the Colombian police or other authorities after allegedly having been threatened by two members of the Revolutionary Armed Forces of Columbia (or the FARC) and instead simply fled, first to the United States of America and then to Canada, where he made a refugee claim. The Board then went on to review the voluminous documentary evidence before it regarding the ability of the Colombian state to provide adequate protection to its citizens. The Board concluded in this regard that there were "some inconsistencies among the several sources within the documentary evidence" but that "the preponderance of the objective evidence … suggest[ed] that … there is adequate state protection in Colombia for victims of crime, that Colombia is making serious efforts to address the problems of criminality, and that the police are both willing and able to protect victims" (Decision at para 35). The IRB thus determined that the applicant had failed to rebut the presumption of state protection with clear and convincing evidence and for this reason (coupled with the applicant's lack of credibility) dismissed his claim.

[4] The applicant asserts that the Board committed a reviewable error in its state protection analysis because it failed to analyze (or even mention) three key pieces of evidence which

indicate that the Colombian state cannot protect individuals who face threats from the FARC, namely, two relatively recent reports from well-qualified academics, Drs. Marc Chernick and James Brittain, as well as a 2010 letter from Amnesty International. The applicant relies on four cases, *Niño Yepes v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1357 at para 10 [*Yepes*], *Ortiz de Martheyn v Canada (Minister of Citizenship and Immigration)*, Court Docket: IMM-1861-11 (October 3, 2011) [*de Martheyn*], *CMMV v Canada (Minister of Citizenship and Immigration)*, 2011 FC 543 at paras 16-19 [*CMMV*] and *Cetinkaya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 8 at para 66 [*Cetinkaya*], in which this Court held that failure to mention some or all of these or similar reports rendered a decision unreasonable. (A comparable finding was reached in *Ortiz Rincon v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1339 [*Rincon*], which is also discussed below.) The applicant urges that a similar finding be made in this case.

[5] For the reasons set out below, I have determined that it is inappropriate to do so because these decisions are distinguishable. In addition, they pre-date the decision of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*]. That case represents a marked change in the law of judicial review and underscores that a tribunal's failure to discuss portions of the evidence that contradict its finding will not, necessarily, give rise to reviewable error.

Analysis

[6] The standard of review applicable to the error the applicant alleges the RPD made in its state protection analysis is reasonableness. It is well-settled that the reasonableness standard

applies to the review of the RPD's state protection findings, because they are either factual findings or findings of mixed fact and law (see *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para 38, [2007] FCJ No 584).

[7] The essence of the applicant's argument in this case is that the Board's state protection determination, in the words of paragraph 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7 [FCA], is " based on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it" because the applicant argues that the Board committed a reviewable error in improperly disregarding evidence.

[8] Arguments like that made by the applicant in this case, regarding the impact of the failure to analyze allegedly key portions of the objective evidence, are frequently advanced in immigration judicial review matters. As Justice Hughes noted in *Persaud v Canada (Minister of Citizenship and Immigration)*, 2012 FC 274 [*Persaud*] at para 7:

> This is an issue, stated one way or other, often raised in a judicial review of this nature. What follows in Counsel's written and oral argument is often a microscopic, detailed, lengthy review of every piece of evidence in the record that may possibly be considered as supportive of Counsel's client's case. The written evidence is often presented in bold type and in Counsel's oral argument presented with great forensic skill so as to emphasize and elevate its importance. The conclusion the Court is urged to reach is that such "important" evidence was overlooked by the [tribunal] or not stated in the reasons and thus the decision must be considered "unreasonable". Often reliance is placed on the decision of Evans J (as he then was) in the *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1988] FCJ No 1425, 157 FTR 35 [*Cepeda-Gutierrez*].

[9] As Justice Hughes stated in *Persaud*, and as I likewise noted in *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 [*Rahal*], Justice Evans' decision in *Cepeda-Gutierrez* does *not* stand for the proposition that failure to analyze evidence that runs contrary to a tribunal's conclusion necessarily renders a decision unreasonable. Rather, in *Cepeda-Gutierrez* Justice Evans held that failure to consider specific evidence must be viewed in context and will lead to a decision's being overturned only where the non-mentioned evidence is critical, contradicts the tribunal's conclusion and the reviewing court determines that its omission means that the tribunal did not have regard to the material before it.

[10] Particularly in light of several recent decisions from the Supreme Court of Canada, a reviewing court should be circumspect in inferring that an administrative tribunal had no regard to the evidence before it when it fails to mention contradictory evidence in its decision.

[11] In my view, the starting point for the inquiry in respect of an argument regarding the impact of failure to mention key evidence is that the reviewing court must presume that the tribunal considered the entire record (see *Ayala Alvarez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 703 at para 10; *Guevara v Canada (Minister of Citizenship and Immigration)*, 2011 FC 242 at para 41; *Junusmin v Canada (Minister of Citizenship and Immigration)*, 2009 FC 673, 2009 CF 673 at para 38). Thus, those advancing arguments like that made by the applicant in this case bear a high burden of persuasion. Secondly, it must be recalled that the task of the reviewing court is the assessment of the reasonableness of the tribunal's findings of fact. This inquiry involves consideration of *both* the outcome reached and the reasons offered by the tribunal as the Supreme Court of Canada underlined in, *inter alia*, *Dunsmuir v*

New Brunswick, 2008 SCC 9, [2008] 1 SCR 190 and *Newfoundland Nurses* at para 14. Finally, and perhaps most importantly, the reviewing court must afford significant defence to the tribunal's factual findings, particularly where, as here, the impugned determination falls within the core of the tribunal's expertise. Assessments of risk and of the availability of adequate protection for refugee claimants in foreign states lies at the very core of the competence of the RPD and are matters that Parliament has mandated to fall within the RPD's jurisdiction (see IRPA at para 95(1)(b); *Pushpanathan v Canada (Minister of Employment and Immigration)*, [1998] 1 SCR 982, [1998] SCJ No 46 at para 47; *Saldana Fajardo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 830 at para 18; *Kellesova v Canada (Minister of Citizenship and Immigration)*, 2011 FC 769 at para 11).

[12] As mentioned, the decision in *Newfoundland Nurses* is of central importance in this application. There, the Court adopted a new approach to evaluation of the adequacy of an administrative tribunal's reasons in holding that the provision of inadequate reasons does not amount to a denial of procedural fairness, provided some reasons are given. In so ruling, the Court overturned previous authorities which indicated that failure to provide adequate reasons amounts to a denial of procedural fairness. The Supreme Court also considered the adequacy of a tribunal's reasons with reference to evaluating whether a decision is reasonable and emphasized that that inadequacy of reasons is not a stand-alone basis for finding a decision unreasonable. Rather, the Court held that the reasonableness of a decision must be evaluated with reference to *both* the outcome reached and the reasons given. The Court also again instructed that reviewing courts must afford significant deference to a tribunal's decisions under the reasonableness standard. Justice Abella, writing for the Court, stated as follows on these points:

[15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons 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.

[…]

[18] Evans J.A. in *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, explained in reasons upheld by this Court (2011 SCC 57) that *Dunsmuir* seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that "perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:

> When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]

[13] Decisions of this Court which pre-date *Newfoundland Nurses*, in my view, must be read in light of the direction provided by Justice Abella, who wrote for a unanimous Court in that case. The impact of her decision in *Newfoundland Nurses* (and of the Court's earlier decision in *Dunsmuir*) is that I must consider not only the Board's reasoning but also the result it reached in evaluating the reasonableness of its state protection analysis. I must also, to quote Justice Abella, "be cautious about substituting [my] own view of the proper outcome by designating certain omissions in the reasons to be fateful" (*Newfoundland Nurses* at para 17).

[14] Turning first, then, to the reasons advanced by the RPD in this case, the Board's reasons actually do reflect that it was aware of the objective evidence that ran counter to its conclusion, including, presumably, the three reports that the applicant argues are key. As noted, the RPD wrote that there were "some inconsistencies among the several sources within the documentary evidence" (Decision at para 35) but held that the "preponderance of the objective evidence" suggested adequate state protection was available in Colombia. Thus, the reasons themselves indicate that the Board did not ignore the three reports the applicant alleges were ignored. This distinguishes this case from *Yepes*, *de Martheyn*, *CMMV* and *Cetinkaya*.

[15] It would appear that no similar statements were made by the Board in *Yepes*, *de Martheyn*, *CMMV* or *Cetinkaya* and thus there arguably was a firmer basis in those cases for concluding that the Board had ignored the particular pieces of evidence in question. In addition, the decision in *Yepes* was premised in large part on the RPD's failure to make credibility findings or to assess the truthfulness of the claims, which, in the word of Justice Barnes, resulted

in the Board failing "to consider the country-condition evidence in the context of a family that had been repeatedly targeted […]" (at para 5).

[16] Justice Mactavish's decision in *Rincon* is likewise distinguishable as it turns in large part on errors made by the Board regarding the assistance it found the police provided the claimants, when in fact the assistance was not given. Findings for which there is no evidence before the Board do run afoul of paragraph 18.1(4)(d) of the FCA (see *Rahal* at paras 34-40).

[17] Contrary to the situation in *Rincon*, there was a wealth of evidence before the RPD in this case to support its finding of adequate state protection as, indeed, the Board highlights at length in the decision. Thus, its decision is not incompatible with the evidence and cannot be said to be made in a manner that was perverse, capricious or without regard to the material before it.

[18] That the result reached by the Board is reasonable is further supported by the fact that recent cases from this Court overwhelmingly support the reasonableness of RPD decisions finding there to be adequate state protection in Colombia for those who were in similar circumstances to those of the applicant and who were threatened by the FARC (from 2012, see *Mendoza-Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1367; *Herrera Arbelaez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1129; *Garavito Olaya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 913; *Hernandez Bolanos v Canada (Minister of Citizenship and Immigration)*, 2012 FC 513; *Castro Nino v Canada (Minister of Citizenship and Immigration)*, 2012 FC 506; *Ayala Nunez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 255, 213 ACWS (3d) 451; *Sernas de Toro v Canada*

(Minister of Citizenship and Immigration), 2012 FC 245, 211 ACWS (3d) 945; *Alexander Osorio v Canada (Minister of Citizenship and Immigration)*, 2012 FC 37, 211 ACWS (3d) 187 [*Osorio*]).

[19] Indeed, in several of these cases, at least some of the reports that the applicant argues were key were discussed by the Board, and the Board's decisions, finding there to be adequate state protection in Colombia, were upheld by this Court (see e.g. *Osorio*; *Murillo Guevara v Canada (Minister of Citizenship and Immigration)*, 2011 FC 242; *Velez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 923; *Idarraga Cardenas v Canada (Minister of Citizenship and Immigration)*, 2010 FC 537). Thus, where the Board specifically mentioned the reports at issue, this Court has upheld the Board's decisions as being reasonable.

[20] In the past year, this Court has overturned RPD decisions on state protection in Colombia only where the RPD was shown to have failed to properly assess the background or "profile" of the claimant and the claimant fell into one of the groups that the documentary evidence indicates may be at risk in Colombia, namely, members and supporters of one of the armed groups or parties to the conflict, members of local or regional governments, judges and other individuals associated with the justice system, civil society and human rights activists, journalists and other members of the media, trade union leaders, teachers, university professors and students, indigenous peoples and afro-colombians, women and children with certain profiles and marginalized social groups. The objective documentary evidence, and in particular the May 27, 2010 report of the Office of the UN High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Colombia*,

indicates that members of such groups may continue to be at risk from the FARC in Colombia. (See *Zuluaga Robles v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1134, in which the Board failed to consider evidence in light of applicant's claim that she fell within a targeted group as the family of human rights abuse victims and workers in the context of a PRRA application; *Olivares v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1010, in which the Board failed to consider whether the applicant was a human rights worker and at risk on that basis; *Osorio Garcia v Canada (Minister of Citizenship and Immigration)*, 2012 FC 366, in which the Board failed to consider the particular risk profile of the applicant who was involved in a high-profile social justice organization; *Arias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 322, in which the Board mischaracterized the applicant as a "lowly court clerk" when in fact he was the nephew of a judge; and *Acevedo Munoz v Canada (Minister of Citizenship and Immigration)*, 2012 FC 86, 211 ACWS (3d) 420, in which the Board failed to consider the profile of the applicant who alleged persecution on the basis of his perceived political opinion for his involvement in a Community Action Group.) These cases turn on the failure of the Board to consider the heart of the claims advanced by the claimants and to assess their profiles against the documentary evidence, which indicated that they might be at risk. Simply put, in these cases, the Board failed to conduct the analysis it was required to undertake.

[21] In the present case, however, the Board properly assessed the applicant's profile and evaluated his particularized risk in light of what had transpired and the objective country documentation. It thus undertook the inquiry it was mandated to undertake and, for the reasons noted, its conclusion was reasonable. In light of the nature of the Board's reasons and the wealth of authority supporting similar conclusions reached in similar cases, the applicant's argument is

essentially a highly technical one that amounts to no more than a criticism of the failure to specifically discount – as opposed to generally discounting – the relevance of the reports from Drs. Brittain and Chernick and from Amnesty International. That such an argument is without merit is definitively settled in *Newfoundland Nurses*, where Justice Abella noted that a decision maker is not required "to make a finding on each constituent element, however subordinate, leading to its final conclusion" (at para 16).

[22] In light of the foregoing, this application for judicial review is dismissed. No question for certification under section 74 of the IRPA was presented and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review of the RPD's Decision is dismissed;

2. No question of general importance is certified; and

3. There is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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