

Federal Court



Cour fédérale

Date: 20160210

Docket: IMM-2210-15

Citation: 2016 FC 180

Toronto, Ontario, February 10, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DIDIER MAURICIO VALDEBLANQUEZ ORTIZ

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, wherein the RAD upheld a decision of the Refugee Protection Division [RPD] that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the IRPA.

II. Background

[2] The Applicant, Didier Mauricio Valdebanquez Ortiz (age 32), is a citizen of Colombia.

[3] The Applicant, a pharmacist, alleges that he was persecuted by the Revolutionary Armed Forces of Colombia - People's Army [FARC] in Bogota. In October 2012, the FARC demanded large quantities of drugs from the Applicant; and, when the Applicant refused, he and his cousin – who worked for him at the pharmacy, were both beaten. Thereafter, the Applicant's common law spouse received threatening telephone calls.

[4] In November 2012, the Applicant moved his pharmacy to another neighbourhood in Bogota; but, was again persecuted by the FARC. In April 2013, the Applicant was allegedly kidnapped by FARC members. He was stabbed and needed surgery. The Applicant submitted as evidence, before the RPD, a medical report and a police report related to the incident.

[5] After receiving another threatening note from the FARC, the Applicant moved to the city of Riochacha on May 26, 2013. He returned to Bogota on July 22, 2013; and, while in Bogota with his cousin, someone shot at them. His cousin was killed. On August 1, 2013, the Applicant moved to Bucaramanga and hid there for five months.

[6] On January 20, 2014, the Applicant returned to Bogota to apply for a visa for the United States; and, fled to the United States on May 17, 2014. On June 2, 2014, the Applicant illegally

entered to Canada allegedly with the assistance of a stranger he had met in a train station in New York. The Applicant claimed asylum in Canada on June 18, 2014.

[7] In a decision dated November 5, 2014, the RPD rejected the Applicant's claim for refugee status. The RPD had doubts in respect of the veracity of allegations central to the Applicant's narrative. Namely, the RPD did not believe that the Applicant had to change his place of business in order to escape the alleged threats of the FARC; the Applicant contradicted himself during his testimony as to why his cousin decided to stay in Bogota despite the threats; and, someone fearing the FARC would not return to Bogota simply to visit his common law spouse and his cousin. Furthermore, the RPD held that it was not probable that the Applicant decided to pay a stranger, met coincidentally in a train station in New York, \$5,000 to help him cross the Canadian border; and, entrust him with his story. Moreover, given RPD's doubts regarding allegations central to the narrative of the Applicant, the RPD gave no probative weight to several supporting documents, including: a surgical report, the death certificate of his cousin; as well as medical and police reports.

[8] The refugee status claim of the Applicant, and his common law spouse, Maryori Umana Rodriguez, were joined for their hearing before the RPD. The Applicant appealed to the RAD; and, Ms. Rodriguez sought judicial review of the RPD's decision.

[9] In a decision dated April 20, 2015, the RAD dismissed the appeal.

III. Impugned Decision

[10] The RAD was guided by *Huruglica c Canada (Minister of Citizenship and Immigration)*, 2014 FC 799; the RAD stated that its role is to intervene on a determination of facts only where there is an overriding and palpable error by the RPD. Nonetheless, the RAD recognized that it must conduct an independent assessment of the evidence as a whole (see *Youkap v Canada (Minister of Citizenship and Immigration)*, 2015 FC 249).

[11] The RAD held, after reviewing the evidence as a whole and listening to the audio record of the hearing, that the RPD did not err in its overall determination. Subsequently, the RAD held that, on the balance of probabilities, the Applicant was not credible, specifically with regard to the sale of his first pharmacy and the opening of a second pharmacy. The RAD found that the Applicant only sold his first pharmacy after he was in Canada, and not in 2012 as alleged. Moreover, the Applicant did not provide any corroborative evidence of ownership in the second pharmacy. The credibility of the Applicant was furthermore affected by his difficult testimony before the RPD, during which the Applicant changed his answers, and, the questions had to be asked numerous times.

[12] Regarding the fact that the RPD did not give probative weight to official documents without analysis or evidence or a statement in respect of the genuineness of the documents; the RAD held that the RPD was not bound to address each and every document. As a result of the foregoing, the RAD dismissed the appeal; and, upheld the RPD's decision that the Applicant is neither a Convention refugee nor a person in need of protection.

IV. Issues

[13] The central issues to be determined by this application for judicial review are:

1. Did the RAD err in upholding RPD's credibility findings?
2. Did the RAD breach procedural fairness by having made new negative credibility findings against the Applicant without having provided the parties an opportunity to address the RPD's concerns?

V. Legislation

[14] The following are the relevant legislative provisions:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne

fear, unwilling to return to that country. veut y retourner.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualité de

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| <p>a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.</p> | <p>personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.</p> |
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VI. Position of the Parties

[15] The Applicant submits that the RAD erred in upholding RPD's credibility findings regarding the ownership of the first pharmacy. Secondly, it was a reviewable error for the RAD to have upheld the RPD's decision to reject documents, used as corroborative documents, in the absence of evidence tending to show their invalidity (*Halili v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 999). Thirdly, the RAD erred in upholding the RPD's findings that the Applicant lacked subjective fear. Fourthly, it was unfair for the RAD to make a negative inference regarding the police report, and the death certificate, without the RAD having put forward to the Applicant its concerns, as these were not raised before the RPD (see *Dundar v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1026 at paras 19-22); thus, the RAD breached procedural fairness.

[16] Conversely, the Respondent submits that the onus is on the Applicant to establish his claim. The RAD is entitled to conduct its own analysis of the evidence before the RPD; it is not an error for the RAD to find an applicant's evidence lacking when an applicant fails to submit supporting evidence that could have been obtained (*Reyna Flores v Canada (Minister of Citizenship and Immigration)*, 2010 FC 874 at para 9; section 11 of the *Immigration and Refugee*

Protection Regulations, SOR/2002-227). Furthermore, the RAD did not err in upholding the RPD's findings in regard to the lack of subjective fear of the Applicant.

VII. Standard of Review

[17] The RAD's decision to uphold RPD's credibility findings is reviewable on the standard of review of reasonableness; and, the RAD has a duty of deference regarding the credibility findings of the RPD as the RPD has had the opportunity to hear the witness (*Koffi v Canada (Minister of Citizenship and Immigration)*, 2016 FC 4 [*Koffi*]). Whether the RAD breached procedural fairness by making additional credibility findings without sharing those concerns with the parties must be reviewed on the standard of correctness (*Husian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 684 [*Husian*]).

VIII. Analysis

[18] The RAD correctly held that it owes a high level of deference towards RPD's findings of credibility. As explained by Justice Mary J. L. Gleason, in *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at para 42, the RPD has "the advantage of hearing the witnesses testify, observed their demeanor and is alive to all the factual nuances and contradictions in the evidence". In the present case, the RAD upheld RPD's findings of lack of credibility of the Applicant; specifically, the RPD had held that:

- The Applicant's testimony was inconsistent with regard to why his cousin did not leave Bogota and join the Applicant in Riochacha;

- The lack of corroborative evidence regarding the ownership of a second pharmacy and the sale of the first one;
- The Applicant's implausible and inconsistent testimony as to why his common law spouse did not leave Colombia with him; and,
- The implausibility of the Applicant's encounter with a stranger at a train station in New York, and, his decision to pay a stranger \$5,000 to help him illegally cross the Canadian border.

[19] The RPD had the opportunity to hear the Applicant and appreciate the Applicant's demeanor during his testimony. The RPD found that the Applicant's testimony was difficult, as questions had to be put to the Applicant more than once.

[20] The RAD, cognizant of the deference owed to the RPD, conducted its own assessment of the evidence as a whole. The RAD agreed with the findings of lack of credibility of the Applicant; as it found that the Applicant lacked credibility on essential elements of his narrative regarding threats allegedly made by the FARC to himself and his common law spouse. In assessing whether the RAD's decision to uphold RPD's credibility findings is reasonable, the Court must look at the RAD's reasons as a whole; its analysis does not involve determining whether each point in its reasoning meets the reasonableness standard (*Jarada v Canada (Minister of Citizenship and Immigration)*, 2005 FC 409; *Uwitonze v Canada (Minister of Citizenship and Immigration)*, 2012 FC 61). Given the numerous and important discrepancies raised by the RPD in its decision, it was reasonable for the RAD to find that the Applicant lacked credibility on core elements of his narrative.

Procedural Fairness

[21] An important issue in the present case is that the RPD did not stop its assessment of RPD's decision at that point; it made additional credibility findings against the Applicant. The RAD, in conducting its independent assessment of the evidence, held that numerous evidence, including the police report, should not be given weight. To quote Justice Roger T. Hugues in *Husian*, above at para 9: "Had the RAD simply reviewed the findings of the RPD as to the adequacy of the Applicant's evidence and agreed with it, that would have ended the matter". Instead, the RAD, as pointed out by the Respondent in its Memorandum of Facts, independently made numerous findings regarding the Applicant's credibility:

- The Applicant failed to produce crucial documents to corroborate his claim regarding the sale of his first pharmacy even though he produced several other documents;
- The inconsistent testimony of the Applicant regarding his cousin before the RPD;
- The Applicant moved to two areas where the FARC is actively recruiting children, even though documentary evidence suggest that the FARC has been weakened in Colombia; and,
- The police report submitted by the Applicant in support of his claim did not appear to conform to the descriptions found in the country conditions documents.

(Respondent's Memorandum of Argument, at para 5)

[22] In *Koffi*, above, Justice Catherine M. Kane stated that even if the RAD made independent findings of credibility against an applicant, without putting it before the applicant and giving him

or her the opportunity to make submissions, the RAD's decision may still be reasonable. This is the case where "the RAD did not ignore contradictory evidence on the record or make additional findings on issues unknown to the applicant" (*Koffi*, above at para 38). In the present case, the Court does not find that this exception applies. As an example, the RAD independently held that the police report does not appear to conform to the normally followed process, as described in the documentary evidence (see para 48 of the RAD's decision). The RAD is therefore raising doubts about the genuineness of the police report, an issue which was not discussed by the RPD, and, neither put forth to the Applicant. As a result, the Court finds that a breach of procedural fairness occurred.

IX. Conclusion

[23] Consequently, the application for judicial review is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be granted; and, the file be sent to the RAD for assessment anew by a differently constituted panel. There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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