Federal Court  Cour fédérale

Date: 20200203

Docket: IMM-6056-18

Citation: 2020 FC 54

Ottawa, Ontario, February 3, 2020

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

[redacted] F.G.H.

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

**PUBLIC AMENDED JUDGMENT AND REASONS
(Confidential Judgment and Reasons issued January 15, 2020)**

I. Overview

[1] The Applicant is a citizen of [redacted] and claims to fear a senior member of a violent drug cartel in that country. After being issued a Deportation Order, the Applicant made a Pre-Removal Risk Assessment [PRRA] application. That application was refused. The Applicant now seeks judicial review of the refusal decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA].

[2] After concluding that the Applicant had failed to rebut the presumption of state protection in [redacted] the PRRA Officer [Officer] refused the PRRA. The Applicant submits that the Officer erred in not conducting an oral hearing and in concluding that the Applicant could avail state protection in [redacted].

[3] I am of the view that the state protection analysis in this instance is unreasonable. The application is granted for the reasons that follow.

II. Background

[4] The Applicant moved from [redacted] to the United States in 1985. In 2009, the Applicant was convicted in the US as part of a conspiracy to distribute a significant amount of cocaine, a crime the Applicant was forced to engage in by [redacted] [agent of persecution]. After being released from prison in 2017 the Applicant was deported to [redacted]. The agent of persecution was also convicted of drug related offences and he too was deported to [redacted] upon release.

[5] The Applicant reports that the agent of persecution is a member of a [redacted] drug cartel. He has demanded payment of more than [redacted] from the Applicant, reportedly the value of the drugs seized at the time of arrest and conviction. The Applicant overheard others saying that [redacted] F.G.H.'s name is on a list that the [redacted] has of people to kill and reports that the [redacted] has killed others—including other [redacted]—for smaller debts.

[6] In September of 2018, the Applicant arrived in Canada from [redacted] and sought refugee protection. The Canada Border Services Agency found the Applicant inadmissible due to serious

criminality and issued a Deportation Order. In November of 2018, the Applicant applied for a PRRA which was refused in a decision dated November 26, 2018.

III. Decision under Review

[7] The Officer considered a series of news articles the Applicant had provided detailing drug deaths in the relevant region of [redacted]. The Applicant reported that the deaths were linked to the agent of persecution. The Officer also took note of a decision from a US court indicating the agent of persecution had been convicted of a drug related offence in the US. The Officer concluded that these documents did not demonstrate that the agent of persecution was responsible for the murders described in the news articles.

[8] The Officer then considered whether the Applicant could reasonably avail state protection in [redacted] should it be needed. In doing so the Officer addressed the country condition documents noting that "[redacted] has a high crime and homicide rate"; that it is governed by free and fair elections; that despite corruption concerns, [redacted] security forces are operationally adequate; that the [redacted] government is making serious efforts to combat its high crime rate; and that if the Applicant does not receive protection from local police they can request that it come from a "higher level of authority." On this basis the Officer concluded that state protection in [redacted] is operationally adequate, that the Applicant had not exhausted all reasonable avenues of state protection, and, ultimately, failed to rebut the state protection presumption.

IV. Style of Cause

[9] In seeking a judicial stay of the removal order, the Applicant brought a motion for confidentiality. By Order dated December 12, 2018 Justice Sandra Simpson granted a confidentiality order. The Order requires, among other measures, that any Judgment and Reasons be redacted the extent necessary to ensure anonymity before public release.

[10] In compliance with the December 12, 2018 Order, and to preserve the anonymity of the Applicant, the Applicant will be identified in the style of cause [redacted] as F.G.H.

V. Issues

[11] I have framed the issues as follows:

A. Did the Officer err by not holding an oral hearing?

B. Did the Officer err in concluding that the Applicant did not rebut the state protection presumption?

VI. Standard of Review

[12] This application was argued prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. The parties relied on the *Dunsmuir* framework in advancing submissions on standard of review. (*Dunsmuir v New Brunswick*, 2008

SCC 9 [*Dunsmuir*].) I have applied the *Vavilov* framework in my consideration of the application.

[13] In *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*], Justice Rowe addressed the circumstance where submissions had been made on the basis of the *Dunsmuir* framework yet the reviewing court applied the *Vavilov* framework in determining the matter. Justice Rowe held that submissions from the parties need not be sought and that no unfairness arises where in applying the *Vavilov* framework the applicable standard of review and outcome would have been the same under the *Dunsmuir* framework (*Canada Post* at para 24).

[14] The presumptive standard of reasonableness applies to the second issue that arises on this application under either *Dunsmuir* or *Vavilov* (*Navarro Canseco v Canada (Citizenship and Immigration),* 2007 FC 73 at para 11, *A.B. v Canada (Citizenship and Immigration),* 2019 FC 165 at paragraph 11 [*A.B.*]).

[15] Justice Rowe summarized the attributes of a reasonable decision in *Canada Post* as follows:

> [31] 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to

> understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "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, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on . . . are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100). In this case, that burden lies with the Union.

[16] My conclusions on the merits of the application would be the same under either framework. I am therefore of the view, having considered the facts, circumstances and the current sate of the law, that there is no uncertainty as to how the *Vavilov* decision relates to this application (*Vavilov* para 144). As was the case in *Canada Post*, further submissions from the parties are not required. I also note that neither party has sought to make further submissions.

[17] The standard of review to be applied in considering the procedural fairness issue—whether the Officer breached the Applicant's right to procedural fairness by failing to conduct an oral hearing—is best reflected in the correctness standard. However the true nature of this analysis is a consideration of whether the procedure was fair having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69

at para 54, also see *Diallo v Canada (Citizenship and Immigration)*, 2019 FC 1324 at paras 14 and 15).

VII. Analysis

A. *Did the Officer err by not holding an oral hearing?*

[18] Subsection 113(b) of the IRPA provides that an Officer may conduct an oral hearing where, after consideration of the factors prescribed at section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], the Officer is of the opinion an oral hearing is required. Those provisions read as follows:

Consideration of application	**Examen de la demande**
113 Consideration of an application for protection shall be as follows: […]	**113** Il est disposé de la demande comme il suit : […]
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required.	**b)** une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires.
Hearing — prescribed factors	**Facteurs pour la tenue d'une audience**
167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	**167** Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	**a)** l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du

	demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	**b)** l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	**c)** la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[19] The Applicant argues that in refusing the PRRA, the Officer implicitly found that the Applicant's claim that the agent of persecution wants to kill them and that they cannot avail state protection both lacked credibility. [redacted] F.G.H. submits all three factors identified at section 167 of the IRPR indicate that the Officer should have held an oral hearing: the evidence raises a serious issue of credibility because "people are trying to kill [the Applicant]"; this evidence is central to the decision; and, if accepted, would justify allowing the application. The Applicant also argues that the fact that they are in an immigration detention centre should be taken into account in determining whether an oral hearing is necessary.

[20] In *A.B.*, Justice William Pentney notes that it can be difficult to distinguish between a finding of insufficiency of evidence and a veiled credibility finding. In that case, as here, the Officer made a number of findings without mentioning credibility. Justice Pentney addressed the distinction between credibility and weight or probative value:

> [36] A review of the decision shows that the Officer made a number of key findings, without specifically mentioning the credibility issue. The question arises, therefore, whether the Officer made veiled credibility findings. In assessing this, there are no magic words, but it is worthwhile to recall some basic legal concepts. The question of credibility essentially involves whether the evidence is believable; it is a different concept than weight or

probative value. In the words of Justice Denis Gascon in *Huang*, at para 42:

> [42] The term "credibility" is often erroneously used in a broader sense of insufficiency or lack of persuasive value. However, these are two different concepts. A credibility assessment goes to the reliability of the evidence. When there is a finding that the evidence is not credible, it is a determination that the source of the evidence (for example, an applicant's testimony) is not reliable. Reliability of the evidence is one thing, but the evidence must also have sufficient probative value to meet the applicable standard of proof. A sufficiency assessment goes to the nature and quality of the evidence needed to be brought forward by an applicant in order to obtain relief, to its probative value, and to the weight to be given to the evidence by the trier of fact, be it a court or an administrative decision-maker. [Emphasis added.]

[21] Where a review of a decision demonstrates that one or more of a decision maker's findings is linked to whether or not an Applicant has been truthful then the finding may in fact be a veiled credibility finding. Here, there is no indication that the Officer did not believe the Applicant's narrative.

[22] In considering the PRRA application the Officer made three core findings: that the news articles and other documentation did not demonstrate that the agent of persecution was responsible for any murders; that state protection in [redacted] is operationally adequate; and that the Applicant had not exhausted all reasonable avenues of protection. None of these conclusions suggest the Officer did not believe the Applicant was being truthful in submissions. In finding the documentation failed to demonstrate the agent of persecution was responsible for the reported murders the Officer was making a comment on the sufficiency of the evidence

presented, not the Applicant's credibility. Similarly, the Officer's assessment of the documentary evidence as it relates to the adequacy of state protection and whether the Applicant had exhausted all reasonable avenues of protection, do not raise credibility issues.

[23] For these reasons I am not persuaded that the Officer reached any negative conclusions in respect of the Applicant's credibility. There was no breach of fairness in the Officer's failure to conduct an oral hearing.

B. *Did the Officer err in concluding that the Applicant did not rebut the state protection presumption?*

[24] The Respondent cites *A.B.* at paragraph 46 to set out the law on the state protection presumption:

> [46] The law requires an assessment of whether a refugee claimant can obtain adequate protection from the persecution they fear. This involves an assessment of several factors. States are presumed to be capable of protecting their citizens, except in the case of a state that is in complete breakdown. In order to rebut the presumption of adequate state protection, there must be clear and convincing evidence of the state's inability or unwillingness to protect its citizens, which satisfies the decision-maker on a balance of probabilities (see *Canada (Attorney General) v Ward*, 1993 CanLII 105 (SCC), [1993] 2 SCR 689; *Flores Carrillo v Canada (Citizenship and Immigration)*, 2007 FC 320 (CanLII), [2008] 1 FCR 3 (FC)). What is required is that the state take effective measures that result in adequate state protection; good faith efforts that don't achieve results are not sufficient. However, the protection need only be "adequate"; no state can guarantee perfection (*Canada (Citizenship and Immigration) v Villafranca* (1992), 1992 CanLII 8569 (FCA), 18 Imm LR (2d) 130 (FCA)).

[25] The Respondent states that the news articles submitted by the Applicant do not satisfy that burden and the evidence does not support the view that the police are not doing anything. I am unpersuaded by the Respondent's submissions.

[26] The Officer in this case has not refused the PRRA application on the basis that the Applicant failed to place sufficient evidence before the Officer to establish the feared risk; nor has the Officer found the Applicant not to be credible. As the Respondent has stated in written submissions, the Officer simply has not taken a position on whether the narrative is to be believed or disbelieved. Instead, the Officer has refused the PRRA application on the basis that adequate state protection is available to the Applicant in [redacted].

[27] To be reasonable the Officer's state protection analysis must reflect the hallmarks of justification, transparency and intelligibility and the decision must be justified in relation to the relevant facts and law (*Vavilov* at para 99, citing *Dunsmuir*, at para 47). This decision is lacking in justification, transparency and intelligibility.

[28] The Officer's state protection analysis begins with a review of the country condition documentation. The Officer notes that [redacted] conducts free and fair elections; that federal, state, and domestic police are responsible for law enforcement; that [redacted] suffers from rule of law deficits that limit full enjoyment of political rights and civil liberties; that criminal violence, government corruption, state and non-state human rights abuses, and impunity for the well-connected are among [redacted] challenges; that [redacted] has attempted to address these

challenges by undertaking consultations and deploying troops; that there were more than 42,000 homicides reported in [redacted] in 2012; and that "[redacted] has a high crime and homicide rate."

[29] The Officer noted that the Applicant "has a duty to seek state protection before soliciting international protection" and had not done so. The Officer does note that the Applicant had stated they had not sought protection "because the police are in with the cartels, so they will not protect anyone" and that the "applicant is not required to seek State protection if it would be objectively unreasonable to do so." However, the Officer fails to engage with the Applicant's evidence on this front. It is not at all clear what role, if any, the Applicant's explanation for not seeking protection played in the analysis. Similarly, while the Officer details evidence of state efforts, notes that local failures to provide protection do not necessarily amount to a lack of state protection and that state protection need not be perfect, the adequacy of state efforts is not addressed in the decision.

[30] The recitation of underlying principles of law and an overview of efforts is not sufficient to demonstrate a chain of analysis upon which I can conclude the decision is reasonable. The Officer has not engaged in any analysis of the Applicant's particular circumstances: the agent of persecution, an individual in a [redacted] cartel, desires to kill the Applicant over a significant debt that arose out of a failed conspiracy to distribute cocaine. In failing to address the evidence provided by the Applicant and disclosed in the country condition documentation indicating that those in situations similar to the Applicant's do not benefit from adequate state protection, the Officer has left a gap in the chain of analysis. The gap relates to an issue that is central to the

Officer's determination. This undermines the justifiability, transparency and intelligibility of the decision (*Vavilov* at para 103).

VIII. Conclusion

[31] The application is granted. The parties have not identified a serious question of general importance for certification and none arises.

JUDGMENT IN IMM-6056-18

THIS COURT'S JUDGMENT is that:

1. The application is granted;

2. The matter is returned for redetermination by a different decision maker;

3. No question is certified; and

4. The style of cause is amended with immediate effect identifying the Applicant by [redacted] F.G.H.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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