Federal Court  Cour fédérale

Date: 20140417

Docket: IMM-1546-13

Citation: 2014 FC 370

Ottawa, Ontario, April 17, 2014

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

FRANCISCO IVAN GIL ARANGO

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought by Francisco Ivan Gil Arango (Mr. Gil) challenging a decision by a Senior Immigration Officer (Officer) rejecting his pre-removal risk assessment (PRRA) application.

[2] Mr. Gil is a 64-year-old citizen of Colombia. He arrived in Canada in 1975 as a permanent resident but lost that status in 1986 after a conviction for conspiracy to traffic in

narcotics. In the result a deportation order was issued. When Mr. Gil failed to appear for his appeal from the deportation order, the appeal was declared abandoned. In 1987, a warrant was issued for his arrest. It was not until 2013 that he was apprehended at work in Toronto.

[3] According to Mr. Gil, he returned to Colombia in 1986 and later entered the United States where he lived for many years. It was not until 2003 that he returned to Canada. Notwithstanding the above history, he claims to have been "confused" about his immigration status at that time and "genuinely thought that [his] permanent resident status was still valid".

[4] Mr. Gil's PRRA was based on a family history of persecution by the Revolutionary Armed Forces of Colombia (FARC) beginning in the 1980's. He claimed that his family are land owners with three properties near Medellin. Over the years many members of the family were extorted by the FARC, and in four instances, relatives were murdered. Two of his brothers came to Canada to escape the violence and one of them was accepted as a refugee.

[5] Mr. Gil submitted his formal PRRA application on January 30, 2013. His counsel advised that "further submissions are due on February 14, 2013". On February 14, 2013, counsel forwarded Mr. Gil's substantive PRRA submissions and an affidavit from Mr. Gil. Counsel's letter indicated another affidavit and copies of the supporting documents would follow via courier. He requested that a decision be deferred until the additional documents were received. On February 20, 2013, counsel sent the promised documents by courier and delivery was effected the next day. Included in that package were translated death certificates for four deceased members of Mr. Gil's family, a number of country condition reports detailing the

current FARC risk in Colombia and an affidavit from Mr. Gil's brother recounting the family history in that country.

[6] According to the affidavit of the Officer, her initial decision rejecting Mr. Gil's PRRA application was rendered on February 20, 2013. Mr. Gil deposes that this decision was served on him on February 22, 2013. On February 27, 2013, Mr. Gil filed an application for judicial review from that decision along with a motion for a stay of removal. On February 28, 2013, counsel for the Respondent sent to Mr. Gil's counsel an affidavit from the Officer that included a supplemental set of reasons dealing with the February 20th document package. The Officer discounted the probative value of the family death certificates on the basis that the deaths were not linked to the FARC. She also considered the country condition reports and acknowledged that FARC "still has a presence in Bogota" albeit relatively small. She concluded her supplemental decision in the following way:

> I have reviewed all the submissions before me including the human rights reports and news articles the Applicant submitted.
>
> I find that the Applicant brought forward insufficient evidence that he will personally be targeted by the FARC in Bogota. I also find that the Applicant has not brought forward clear and convincing evidence that the state of Colombia cannot provide adequate state protection to him should he return to Colombia today.
>
> Therefore, my decision of February 20, 2013 remains as not allowed.

[7] According to the Officer's affidavit, she was unaware of the February 20th document package sent by Mr. Gil's counsel until her return to the office on February 27, 2013. It was at that point that she rendered her supplemental reasons.

[8] Mr. Gil argues that the process followed by the Officer was unfair, that she was *functus officio* after serving her initial decision and that she effectively usurped the jurisdiction of the Federal Court when she rendered supplemental reasons in the face of Mr. Gil's application for judicial review. These are all essentially issues of procedural fairness that I will assess on the basis of the standard of correctness. Mr. Gil has also raised an evidence-based issue in connection with the Board's internal flight alternative (IFA) analysis. That issue will be examined under the deferential standard of reasonableness.

[9] Mr. Gil relies on a series of decisions beginning with *Chudal v Canada*, 2005 FC 1073, [2005] FCJ No 1327, dealing with the duty to consider late delivered materials: also see *Monongo v Canada*, 2009 FC 491, [2009] FCJ No 956 and *Ayikeze v Canada*, 2012 FC 1395, [2012] FCJ No 1557.

[10] In *Chudal*, above, Justice Roger Hughes held that a PRRA officer had an "obligation to receive all evidence which may affect the decision until the time the decision is made". According to Justice Hughes, the decision is made when it is delivered to the affected party. Justice Hughes did not deal with the issue of whether a PRRA officer had the discretion to consider late-received evidence and to reopen an already-delivered decision.

[11] The decision of Justice Richard Boivin in *Ayikeze*, above, follows the *Chudal* holding and confirms the duty of a PRRA officer to consider new evidence up to the point of the decision being communicated. As in *Chudal*, above, no mention is made of the principle of *functus officio*.

[12] The decision most relied upon by Mr. Gil is that of Deputy Justice Orville Frenette in *Monongo*, above. In that case, it was the Minister who argued that the PRRA officer lacked the authority to issue a supplemental decision in response to the receipt of new evidence. Justice Frenette agreed with the Minister on the basis of the following analysis:

> [18] According to the *functus officio* principle, a decision-maker no longer has jurisdiction over a matter once he or she has delivered the decision. Consequently, the PRRA officer became *functus officio* on August 21, 2008, after having delivered and signed her decision and having disclosed it to the applicant. This point is made in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. This Court's decisions have applied this classic rule of *functus officio* to administrative decisions, i.e. that the decision is final after it is signed and has been disclosed to the parties: *Chudal v. Minister of Citizenship and Immigration*, 2005 FC 1073; *Pur v. Minister of Citizenship and Immigration*, 2008 FC 1109; *Dumbrava v. Minister of Citizenship and Immigration* (1995), 101 F.T.R. 230.
>
> [19] Moreover, Justice Barbara Reed in *Nouranidoust v. Canada (Minister of Citizenship and Immigration)*, [2000] 1 F.C. 123, is less categorical or formalistic; she wrote, referring to remarks by Justice Sopinka in *Chandler*, above:
>
> > [13] . . . However, he noted that the doctrine should be applied flexibly to administrative tribunals:
> >
> > . . . I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law.
>
> Justice Reed found that an immigration officer could reopen a file "when the officer considers it in the interests of justice to do so".
>
> [20] This judgment appears significantly marginal when analyzing the weight of authority. I must conclude that in the circumstances of this record, the principle of *functus officio* must apply; therefore, the decision of August 21, 2008, must be the only decision for consideration.

[13] Mr. Gil also relies on the Minister's PRRA Guidelines (PP3) dealing with the issue of *functus officio*. Those provisions confirm the holding in *Chudal* and go further to state that once a PRRA decision is communicated, the decision-maker is "considered to have performed the task for which they were empowered and consequently no longer have jurisdiction to reconsider or otherwise review their decision".

[14] According to Mr. Gil's argument the Officer's decision was final on February 22, 2013 and she had no authority to reconsider it in light of the late delivered documents. At the same time, Mr. Gil argues that the Officer's final decision must be set aside because it failed to take account of the late-delivered documents. The only option said to remain was for the initial decision to be set aside with the matter to be redetermined ostensibly by someone impartial.

[15] It seems incongruous to me that an applicant can submit materials late and then expect that the original decision be judicially reviewed as though the content of the new material was constructively known to the decision-maker but ignored. The logic of this argument escapes me. I also do not see how the process that was followed creates any unfairness for Mr. Gil such that he can demand that everything be redone by someone new. His new materials were fully considered and the Officer reasonably found them to be unpersuasive. His fairness argument thus rests solely on the technical pillar of the doctrine of *functus officio*.

[16] I do not agree that the Officer was *functus* in these circumstances nor do I agree with the contrary views expressed in the Minister's PRRA Guidelines or in *Monongo*, above. The law as

I understand it is correctly stated in *Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230, [2010] FCJ No 1159, where Justice Carolyn Layden-Stevenson said:

> [3] We agree with the judge that the principle of *functus officio* does not strictly apply in non-adjudicative administrative proceedings and that, in appropriate circumstances, discretion does exist to enable an administrative decision-maker to reconsider his or her decision. The Minister and the Intervener agreed in this regard on this appeal (Minister's memorandum of fact and law at paragraphs 1, 24-26; Intervener's memorandum of fact and law at paragraphs 24, 25, 33, 36, 47). However, in our view, a definitive list of the specific circumstances in which a decision-maker has such discretion to reconsider is neither necessary nor advisable.
>
> [4] In this case, the decision-maker failed to recognize the existence of any discretion. Therein lay the error. The immigration officer was not barred from reconsidering the decision on the basis of *functus officio* and was free to exercise discretion to reconsider, or refuse to reconsider, the respondent's request.

[17] I also do not accept the point that PRRA decisions ought to be treated differently from other non-adjudicative immigration processes. Significant consequences flow from most decisions of this kind. Furthermore, requests for reconsideration of many such decisions are not uncommon and not infrequently entertained. It does not enhance the efficiency or fairness of administrative decision-making by fettering the discretion to reconsider with the application of a rule designed to achieve finality in adjudicative contexts. Indeed, there is much to be said for an approach that is sensitive to particular circumstances and flexible. Filing deadlines can be missed and relevant evidence over-looked and, for those and other reasons, non-adjudicative decision-makers should be able to entertain reasonable requests for reconsideration.

[18] This situation is very different from the one where a decision-maker attempts to bolster an inadequate set of reasons with an *ex post facto* explanatory affidavit. That practice has

rightfully been criticized: see *Sellathurai v Canada*, 2008 FC 255, [2008] FCJ No 1267. Here the officer realized that her initial decision did not address all of the submitted evidence. She considered the new evidence and found that it was not persuasive. Her analysis of the new evidence was reasonable and cannot be faulted. This was a valid exercise of the discretion to reconsider and not an illegitimate attempt to justify a poorly crafted decision.

[19] I accept Mr. Gil's concern that the Board misapprehended the Canadian Council of Refugees report "The Future of Colombian Refugees in Canada: Are We Being Equitable" when it cited the authors' stated hypotheses as findings. This error is, however, relevant only to the Board's alternative finding that an IFA was available to Mr. Gil in Bogota. It does not affect the Board's principal conclusions that after 30 years away from Colombia, Mr. Gil was not personally at risk and that he had failed to rebut the presumption of state protection. Those conclusions are not challenged and, having regard to the principle of deference, they are unimpeachable.

[20] For the foregoing reasons, this application is dismissed.

[21] Counsel for Mr. Gil proposes the following question for certification:

> Once a PRRA officer has reached a final decision, and that decision has been communicated to the applicant, can the officer revisit that decision or does the doctrine of *functus officio* apply?

The Respondent argues that this question has been answered by *Kurukkal*, above, and, in any event, would not be determinative of the application.

[22] While I am sympathetic to the Respondent's position, there may be some value in having the law concerning *functus officio* further clarified particularly with reference to PRRA decisions. The proposed question raises a point of jurisdiction or procedural fairness and could be determinative of the outcome. I will, therefore, certify the question as posed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed.

THIS COURT'S FURTHER JUDGMENT is that the following question is certified:

> Once a PRRA officer has reached a final decision, and that decision has been communicated to the applicant, can the officer revisit that decision or does the doctrine of functus officio apply?

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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