Federal Court  Cour fédérale

Date: 20180613

Docket: IMM-933-17

Citation: 2018 FC 617

Ottawa, Ontario, June 13, 2018

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

RENE ALONSO PACHECO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

and

MARY E. E. BOYCE

Intervener

JUDGMENT AND REASONS

I. Overview

[1] This decision concerns an application for judicial review of a decision of a member of the Immigration Division of the Immigration and Refugee Board of Canada (ID member) which determined that the applicant, Rene Alonso Pacheco, is inadmissible on grounds of organized criminality pursuant to s. 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. A deportation order against the applicant was subsequently issued.

[2] For the reasons provided below, I have concluded that this application should be dismissed.

II. Facts

[3] The applicant is a 26-year old citizen of El Salvador. He entered Canada on June 25, 1999, at the age of 6.

[4] In March 2016, the applicant was arrested and charged with a number of criminal offenses, some of them serious, including one charge of attempted murder. It appears that some of the charges were based on allegations by the applicant's girlfriend. In November 2016, the applicant pleaded guilty to some minor offenses, and was sentenced to one day in jail and three years' probation. The more serious charges were dropped after the applicant's girlfriend indicated that her accusations against the applicant were untrue.

[5] On May 13, 2016, while the applicant was incarcerated awaiting trial, but before the more serious charges were dropped, he was interviewed by an enforcement officer with the Canadian Border Services Agency (CBSA) in relation to the CBSA's investigation as to whether

there were grounds to report the applicant for being inadmissible. This is referred to hereinafter as the CBSA Interview. During this interview, the applicant stated that he was a member of a criminal organization called MS-13. He also stated that (i) the tattoo of the number 13 on the back of his left hand is gang-related, (ii) he had endured a 13-second beating as an initiation rite to MS-13, (iii) the size of his clique was 10-20 members, and (iv) his clique's territory was in the Jane/Sheppard area of Toronto.

[6] After the CBSA interview, a report pursuant to s. 44 of *IRPA* was prepared alleging that the applicant is inadmissible. This report was then referred to the ID for an admissibility hearing. That hearing (the Admissibility Hearing) took place before the ID member on January 26, 2017, and resulted in the impugned decision.

[7] The applicant's counsel for the Admissibility Hearing, as well as for an earlier detention review hearing, was the intervenor, Mary Boyce. Because the applicant remained incarcerated, interactions between him and the intervenor to prepare for the Admissibility Hearing were limited to a series of telephone conversations.

[8] At the Admissibility Hearing, the applicant stated that, in fact, he had never been a member of MS-13 or any other gang, and that he had been under the influence of drugs during the CBSA Interview. Under questioning by a representative of the respondent, the applicant explained that the "13" tattoo simply represented his lucky number, and that he had learned about MS-13 by watching videos on YouTube. He also indicated that he had no recollection of much of the CBSA Interview due to his drug use. The applicant was also questioned about a change to his Facebook account in 2015 to show a photograph of MS-13 graffiti, but he had no recollection of this either.

[9] The intervenor, acting as the applicant's counsel during the Admissibility Hearing, asked no questions of the applicant. Moreover, her submissions on behalf of the applicant were very short, noting the notorious presence of drugs in prisons and jails and the possibility that the applicant's initial claim to be a member of MS-13 was simply an ill-advised act of bravado. The remainder of the intervenor's submissions at the Admissibility Hearing appear to be an acknowledgment that, though there may be grounds for relief on humanitarian and compassionate grounds, that would have to wait for another day because such considerations have no place in an admissibility hearing.

III. Impugned Decision

[10] The ID member outlined the issues to be (i) "whether Mr. Pacheco has ever been a member of the MS-13", and (ii) "whether the MS-13 was or is an organization engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an indictable offense or in furtherance of the commission of an offence outside of Canada would constitute such an offence."

[11] The ID member discussed the applicant's tattoos, including the "13" tattoo and what the applicant had said about its meaning. The ID member also noted the applicant's admission during the CBSA Interview to being a member of MS-13, his wish to leave the gang, and the difficulty of doing so. The ID member noted the information concerning MS-13 that the applicant had shared during the CBSA Interview, including its initiation rite, the size of his clique, and its territory. The ID member also discussed the applicant's Facebook account

showing the MS-13 graffiti. The ID member also cited documentary evidence indicating, among other things, that (i) tattoos of the number 13 are typical of MS-13 members, (ii) it is difficult to leave a gang, (iii) MS-13 is active in the Jane/Sheppard area of Toronto, (iv) gang cliques typically comprise 10-20 members, and (v) MS-13 members are initiated with a 13-second beating.

[12] The ID member rejected the applicant's statement that he was under the influence of drugs during the CBSA Interview. The ID member noted that this statement was uncorroborated, and further found that the transcript of the CBSA Interview showed that the applicant's interactions with the CBSA officer were logical and straightforward.

[13] The ID member concluded that there were reasonable grounds to believe that the applicant was a member of MS-13. In a separate analysis, the ID member also found, on reasonable grounds, that MS-13 is a criminal organization.

IV. Issues

[14] The applicant's written submissions suggest two grounds of review:

1. Denial of natural justice due to the incompetence of counsel; and
2. Error in the impugned decision.

V. Error in the Impugned Decision

[15] At the hearing of this application, the applicant did not pursue this line of argument as distinct from the denial of justice argument. This was appropriate. On the basis of the evidence

that was presented at the admissibility hearing, it was open to the ID member to find that the applicant is inadmissible for membership in a criminal organization. This evidence included the applicant's admission to being a member of MS-13, corroborated by (i) the "13" tattoo (which he acknowledged was gang-related); (ii) his Facebook page (which he did not state was hacked when asked about it at the hearing); and (iii) his knowledge of MS-13 (including its initiation rite, the territory and size of his clique).

[16] At the hearing of this application, the applicant did not follow up on his written submissions that (i) the ID member had a duty to explore the evidence surrounding the applicant's denial of gang membership, (ii) the ID member incorrectly found that the applicant had admitted harming people as part of the gang, and (iii) there should have been no finding of the applicant's membership in a gang without a finding that he had done something as part of the gang. No jurisprudence was cited with regard to point (i) above, and I know of no such duty, especially in a hearing in which the applicant is represented by counsel. This point really comes down to the competence of counsel. With regard to point (ii) above, I have seen no finding by the ID member that the applicant ever harmed anyone as part of the gang. With regard to point (iii) above, again, no jurisprudence is cited in support of the idea that a person cannot be considered a member of a criminal organization unless they have done something as part of the gang. In fact, this position seems to be contradicted by the text of s. 37(1) of *IRPA*, which provides that a person may be ruled inadmissible on grounds of organized criminality either (i) for being a member of a criminal organization, or (ii) for engaging in certain transnational criminal activities. See also *Canada (Citizenship and Immigration) v Thanaratnam*, 2005 FCA 122.

VI. Incompetence of Counsel

A. *Standard of Review*

[17] The standard of review applicable to an assertion of a breach of natural justice, such as incompetent counsel, is correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Sellaththurai v Canada (Citizenship and Immigration)*, 2014 FC 104 at para 47.

[18] The applicant makes many assertions of incompetence against the intervenor.

B. *Procedural Protocol Regarding Allegations Against Counsel*

[19] Before delving into the analysis of the issue of the competence of the applicant's counsel, it should be noted that a Procedural Protocol dated March 7, 2014 regarding "Allegations Against Counsel or Other Authorized Representatives in Citizenship, Immigration and Protected Person Cases before the Federal Court" (the Procedural Protocol) requires that, before making any allegation of incompetence against former counsel as a ground of relief in an application for judicial review such as this, current counsel must satisfy him/herself, by means of personal investigations and inquiries, that there is some factual foundation for the allegation. Current counsel must also advise former counsel of the allegations and invite a response. The Procedural Protocol was not respected in the present case. The present application, including the allegations of incompetence, was commenced on February 27, 2017, without current counsel for the applicant having first sought the intervenor's input. It appears that the allegations of incompetence were put to the intervenor only in September 2017, after the respondent pointed out the failure to respect the Procedural Protocol.

[20] The stated purpose of the Procedural Protocol is to assist the Court in the adjudication of applications where allegations of incompetence of counsel, or the like, are made. The Procedural Protocol has the additional effect of providing counsel against whom allegations are made the opportunity to respond to those allegations: *Shabuddin v Canada (Citizenship and Immigration)*, 2017 FC 428 at para 18.

[21] The intervenor has since provided a fulsome response to the allegations against her. She has submitted an affidavit and answered questions in cross-examination. Her counsel also submitted a memorandum of argument and made oral submissions at the hearing of this application.

[22] The respondent argues that compliance with the Procedural Protocol might have resulted in the present application never having been commenced. However, the respondent does not argue that the allegations of incompetence should not be considered because of the failure to respect the Procedural Protocol. In the end, I accept that the intervenor has now had an opportunity to respond to the allegations and that response has been of assistance to the Court. Accordingly, on the facts of this case, I will overlook the failure to respect the Procedural Protocol.

C. *Details of the Allegations Against the Intervenor*

[23] Some of the key allegations against the intervenor are as follows:

- She failed to object to the admission of documents at the Admissibility Hearing, including:
    - The transcript of the CBSA Interview;

    - A report by an expert in gang-related issues;
    - The photo of MS-13 graffiti on the applicant's Facebook account;
- She failed to note that the most serious charges that had faced the applicant had been dropped after the applicant's girlfriend indicated that her accusations against the applicant were untrue;
- She failed to note the absence of any criminal convictions or charges related to gang activity;
- She failed to note the lack of evidence of the applicant's involvement with MS-13;
- She failed to ask the applicant any questions at the Admissibility Hearing about his gang affiliation or activity, or submit any other evidence on the applicant's behalf, including evidence submitted by the applicant in the present application;
- She failed to raise any questions about the reliability of the applicant's statement at the CBSA Interview that he was a member of MS-13, including:
    - Whether he was under the influence of drugs at the time;
    - The meaning of his tattoos;
    - Whether his activities in life left no time for involvement with a gang;
    - His mental health problems and habit of making up stories to feel more powerful;
    - Whether his Facebook account had been hacked.

[24] The intervenor responds to these allegations in several ways:

- The impugned decision was based on the applicant's admission that he was a member of a criminal organization and it was not relevant, and would not have changed the result, for the intervenor at the Admissibility Hearing to have raised issues such as

(i) the fact that the serious charges against the applicant had been dropped and (ii) the lack of evidence of gang-related criminal convictions or charges or even any specific gang-related activities;

- There was no basis to object to the admission at the Admissibility Hearing of any of the documents in question;
- During her discussions with the applicant in preparation for the Admissibility Hearing, he never denied being a member of MS-13, never indicated that his statements during the CBSA Interview were false or inaccurate, never indicated that he had been on drugs or otherwise intoxicated during the CBSA Interview, or had any lack of memory thereof, and never indicated that his Facebook account had been hacked;
- Faced with the applicant's contradiction during the Admissibility Hearing of what he had previously told the intervenor, she had an ethical obligation not to participate in what she believed was the applicant's dishonesty – she had to choose between
  (i) limiting her argument and not putting questions to the applicant, and
  (ii) immediately withdrawing as counsel

[25] The applicant flatly contradicts the intervenor's claim that the applicant never denied being a member of MS-13, never indicated that his statements during the CBSA Interview were false or inaccurate, and never indicated that he had been on drugs during the CBSA Interview. He states that he told her he was not in a gang and that he was on drugs during the CBSA Interview.

D. *Applicable Law*

[26] The following passage from the decision of my colleague Justice Cecily Strickland in *Gombos v Canada (Citizenship and Immigration)*, 2017 FC 850, is applicable here and I adopt it entirely:

> [17] The test for addressing allegations of ineffective or incompetent assistance of counsel has been well defined by the jurisprudence (*Zhu v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 626 at paras 39-43). First, the applicant must establish that the impugned counsel's acts or omissions constituted incompetence and, second, that a miscarriage of justice resulted (*R v GDB*, 2000 SCC 22 at para 26 ("*GDB*")). The burden is on the applicant to establish both the performance and the prejudice components of the test to demonstrate a breach of procedural fairness (*Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at para 17). Incompetence of former counsel must be sufficiently specific and clearly supported by the evidence (*Shirwa v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 51 at para 12 (FCA) ("*Shirwa*"); *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 36 ("*Memari*")). There is also a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance (*GDB* at para 27; *Yang v Canada (Citizenship and Immigration)*, 2008 FC 269 at paras 16, 18). Incompetence will only result in procedural unfairness in "extraordinary circumstances" (*Shirwa* at para 13; *Memari* at para 36; *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC 1225 at para 38; *Nizar v Canada (Citizenship and Immigration)*, 2009 FC 557 at para 24). Further, a procedural protocol of this Court, *Re Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court* ("Procedural Protocol"), sets out the procedure applicants must follow when alleging counsel incompetence, which includes giving notice to former counsel.

[27] To summarize, the applicant bears the burden of showing both (i) that the intervenor acted incompetently, and (ii) that such incompetence resulted in a miscarriage of justice such that there is a reasonable probability that, but for the allegedly incompetent acts or omissions, the result would have been different.

E. *Analysis – Whether the Intervenor Acted Incompetently*

[28] As indicated, there is a strong presumption that the intervenor's conduct fell within the wide range of reasonable professional assistance, and incompetence will only result in procedural unfairness in extraordinary circumstances.

[29] Clearly, there were challenges preparing for the Admissibility Hearing because the applicant was incarcerated and his communications with the intervenor could only happen in brief telephone conversations. However, there were several such conversations, and I am not convinced that lack of preparation was a problem here.

[30] If I accept the intervenor's version of events, then I am satisfied that she acted competently. Accepting her version of events, the applicant acknowledged to her before the Admissibility Hearing that he was in a gang and never alleged that he had been on drugs during the CBSA Interview. In that case, she would indeed seem to have been placed in an awkward ethical position when her client made statements in the Admissibility Hearing that contradicted their prior discussions. Without intending to decide any issue that may be more appropriately considered by a lawyers' governing body, I accept that it was reasonable for her not to immediately withdraw as the applicant's counsel, but also not to ask the applicant questions which could result in testimony that the intervenor believed to be untrue.

[31] Based on the intervenor's version of events, the applicant's membership in a criminal organization (the main criterion for inadmissibility) was clearly established, and the intervenor had no reason to believe that it would have been useful to introduce evidence concerning the meaning of his tattoos.

[32] I have been given no adequate reason to believe that there would have been any point in opposing the admission of the CBSA Interview transcript, the expert report, or the Facebook account photo in this situation. The applicant has provided no authority to support his argument that it was inappropriate for the CBSA officer to question him, even with his agreement, without getting the agreement of his criminal lawyer. In addition, I have been given no reason to believe there were grounds to object to the introduction of the expert report. Finally, even when asked about his Facebook account during the Admissibility Hearing, the applicant did not indicate that it had been hacked.

[33] With regard to the intervenor's failure to mention the dropping of the serious criminal charges that had been brought against the applicant, I agree with the respondent and the intervenor that these were not part of the facts that were considered by the ID member for the impugned decision. The same is true of the absence of gang-related criminal charges or convictions against the applicant. The ID member considered only membership in MS-13, and was not concerned with charges or activities related thereto.

[34] Of course, the situation is quite different if I accept the applicant's version of events in which he told the intervenor that he was never in a gang, and that he was under the influence of drugs when he made his admission during the CBSA Interview. If that is the case, then it does indeed appear that the intervenor failed to introduce evidence and ask the appropriate questions to challenge the argument that the applicant was a member of MS-13.

[35] I find the intervenor's version credible and the applicant's version not credible. I find it difficult to believe that the applicant and the intervenor would have had a series of telephone conversations to discuss the CBSA Interview without the applicant stating clearly that his

admission to being a member of MS-13 was false, that he had been under the influence of drugs when he made that statement, and that he had poor recollection of the interview. I also find it difficult to believe that, if the applicant had asserted that he had been on drugs and denied being a gang member, the intervenor would not have at least warned the applicant that she did not believe his new story and could not support him at the Admissibility Hearing if he maintained that assertion.

[36] I am also doubtful of the applicant's credibility because of his statements in his affidavit of August 13, 2017 that (i) the intervenor was not properly appointed to represent the applicant at the Admissibility Hearing, (ii) the intervenor did not prepare the applicant for the Admissibility Hearing, and (iii) the intervenor did not talk to the applicant about the evidence. All of these statements were later shown to be untrue, but only after the intervenor was given notice of these allegations and given an opportunity to respond.

[37] In addition, I note that the ID member found that the applicant's admission to being a member of MS-13 was corroborated by (i) his "13" tattoo, which the applicant initially acknowledged was gang-related, (ii) the MS-13 graffiti on his Facebook account, which the applicant did not initially allege had been hacked, and (iii) his knowledge of the MS-13 initiation rite, the territory and size of his clique.

[38] The applicant has explained that his knowledge of MS-13 came from viewing videos on YouTube. He also states that his statement concerning territory related to where the applicant lived at the time, not the territory of any MS-13 clique. Having reviewed the transcript of the CBSA Interview, I find that the context of the exchange indicates that the applicant was in fact referring to gang territory rather than where he lived.

[39] I find it more credible that the applicant did not state clearly to the intervenor that his admission to being a gang member was false and made under the influence of drugs.

F. *Analysis – Miscarriage of Justice*

[40] As indicated above, the applicant must also convince me that there is a reasonable probability that the result of the Admissibility Hearing would have been different if the intervenor had not failed to do the various things raised by the applicant.

[41] I have already indicated that there was no basis to object to the introduction of evidence by the respondent at the Admissibility Hearing.

[42] As regards evidence that could have been introduced on his behalf, the applicant refers to evidence of:

- The applicant's drug use and mental health problems, including his habit of making up stories to feel more powerful;
- The meaning of the applicant's tattoos and the peer pressure that led to get them;
- The fact that the applicant's Facebook account had been hacked;
- The applicant's activities in life leaving no time for membership in a gang.

[43] I am not convinced that there is even a reasonable probability that the result of the Admissibility Hearing would have been different if this evidence had been before the ID member. The evidence of drug use and mental health problems is far from sufficient to show that the applicant's statements during the CBSA Interview were influenced thereby. The applicant's statement that he got the tattoos as a result of peer pressure does not exclude them as gang-related tattoos. Gang members are peers when one is a member of a gang. The applicant was

asked about his Facebook account during the Admissibility Hearing and had an opportunity to state that it had been hacked. He did not make that statement. Finally, evidence concerning the insufficient time that the applicant would have had for membership in a gang suggests that he had to be active during the time covered by such evidence. There is no requirement that the applicant engaged in certain activities as part of the gang. It is enough that he ever became a member.

VII. Conclusion

[44] For the foregoing reasons, I conclude that the applicant has not met the requirements to set aside the impugned decision either due to any error therein, or due to a denial of natural justice.

JUDGMENT in IMM-933-17

THIS COURT'S JUDGMENT is that:

1. The present application is dismissed.

2. There is no serious question of general importance to certify.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-933-17
STYLE OF CAUSE:	RENE ALONSO PACHECO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND MARY E. E. BOYCE
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