

Federal Court



Cour fédérale

Date: 20181003

Docket: IMM-1139-18

Citation: 2018 FC 986

Ottawa, Ontario, October 3, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

JOSE RIGOBERTO DINARTES

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Dinartes is a citizen of El Salvador. He reports that he fears being targeted by criminal gangs in El Salvador primarily due to the anti-narcotic police work of his cousin in that country.

[2] Mr. Dinartes' application for a pre-removal risk assessment [PRRA] was refused, the PRRA Officer concluding he was neither a Convention refugee nor a person in need of protection. He seeks judicial review of that decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], arguing that the PRRA Officer unreasonably discounted and misapprehended his evidence of risk or, in the alternative, breached his right to procedural fairness by failing to hold an oral hearing.

[3] For the reasons that follow, the application is granted.

II. Background

[4] Mr. Dinartes indicates that he entered the United States [US] in 2001 and remained there for 10 years before being deported to El Salvador in July 2011. Upon his return, he reports that gang members approached him and demanded he join the gang under threat of death. He states that he then fled El Salvador returning to the US and was again deported in January 2012.

[5] Upon being returned to El Salvador in January 2012, he went into hiding to avoid gang contact and then returned to the US for a third time in July 2012. He was involved in an assault while in Maryland and subsequently entered Canada in October 2012. He worked illegally in the Toronto area until he was apprehended by the Canada Border Services Agency in August 2015.

[6] Mr. Dinartes reports that his female cousin was a narco-trafficking investigator with the Salvadoran national police. He is very close to his cousin and they are essentially considered to be siblings. In August 2015, the police killed a gang leader in a shootout. It was subsequently

learned that the gang had ordered that Mr. Dinartes' cousin be killed in revenge. Although his cousin was not involved in the shootout, she had attracted media attention as the only female member of her unit. The Salvadoran police helped his cousin and her family enter the US and begin an asylum claim, which is pending.

[7] Mr. Dinartes' refugee claim was rejected by the Refugee Protection Division [RPD] on the basis that, having failed to establish his identity, the claim had no credible basis. The RPD did not engage in an assessment of the alleged risks and in particular the risk that as the *de facto* sibling of a targeted police officer, he too would be targeted by gangs upon return to El Salvador. The RPD also rejected the Minister's argument that the applicant was excluded from refugee protection due to outstanding criminal charges in Maryland.

[8] After a series of deferral requests and litigation in this Court relating to those requests, Mr. Dinartes submitted a PRRA application in April 2017. The PRRA was refused on February 22, 2018.

III. The Decision under Review

[9] The PRRA Officer excerpted the RPD's decision, noting that the PRRA was not meant to review that decision. However, the PRRA Officer held that identity had been established and was "not at issue in this PRRA." The Officer then set out an overview of the evidence supporting Mr. Dinartes' claim and noted that all evidence regarding the claimed risk had been considered.

[10] The evidence included an affidavit from Mr. Dinartes' cousin setting out both her risk and her belief that Mr. Dinartes could be targeted due to their family relationship if he returned to El Salvador.

[11] The PRRA Officer afforded no weight to his cousin's asylum claim in the US, noting that a copy of the claim had not been provided and that, in any event, the outcome of that process was to be given no weight in assessing Mr. Dinartes' risk. The Officer then discounted the substance of the cousin's affidavit, noting that the objective evidence underpinning her assertion that gang members were interested in the applicant was not identified and that Mr. Dinartes had not provided evidence that gang members were looking for him, had approached his family, or had tried to contact him while he was back in El Salvador. The Officer found the claimed risk to be "vague, speculative, and not supported by corroborating evidence." The Officer also found that Mr. Dinartes' explanation for not contacting the police in El Salvador when approached by gang members in 2011 was speculative and not supported by the evidence, noting the assistance police provided to his cousin.

[12] The Officer then considered a statement from a Mr. Riveras, who reportedly had worked in combatting gang violence in El Salvador. The Officer concluded Mr. Riveras' evidence did not support the alleged risk. Mr. Dinartes had not demonstrated his profile was consistent with Mr. Riveras' descriptions of people at risk in El Salvador, and he had not provided objective evidence that gangs had targeted him or his family in El Salvador.

[13] In considering country condition evidence, the Officer concluded that Mr. Dinartes had failed to link that evidence to his personalized situation and had not established that he faced a risk over and above that faced by the general Salvadoran population.

IV. Issues and Standard of Review

[14] This application raises the following issues:

- A. Did the Officer err in assessing the evidence of Mr. Dinartes' personal risk profile?
- B. Did the Officer ignore objective evidence in assessing the Applicant's personalized risk and the issue of state protection? and
- C. In the alternative, did the Officer breach procedural fairness by failing to convoke an oral hearing?

[15] A PRRA Officer's assessment of the evidence is to be reviewed against a standard of reasonableness. Issues of fairness are to be assessed against a correctness standard, where the reviewing Court is required to determine if the process followed by the PRRA Officer achieved the level of fairness required by the circumstances of the matter (*Zdraviak v Canada (Citizenship and Immigration)*, 2017 FC 305 at paras 6–7).

V. Analysis

[16] The respondent argues that the PRRA Officer's decision must be read in light of prior findings of inconsistencies in Mr. Dinartes' narrative, inconsistencies that go beyond the issue of identity and remain unresolved. The respondent acknowledges that the PRRA Officer made no adverse credibility findings but submits the applicant's evidence had to be assessed in the context of the prior unresolved inconsistencies and negative credibility findings. The respondent further submits that the cousin's affidavit was "slim" and "not very probative," as there was an absence of evidence corroborating her circumstances or conclusions that Mr. Dinartes would be targeted based on their family relationship. The respondent further argues that the PRRA Officer reasonably interpreted the country condition evidence, which only established that family members of individuals at risk "can" be targeted, a threshold that falls short of demonstrating Mr. Dinartes was "likely to be at risk." In summary, the respondent submits the lack of evidence supports the reasonableness of the PRRA Officer's finding that the risk is "vague," "speculative," and "unsupported."

A. *Prior credibility findings*

[17] Although no jurisprudence was cited in support of the respondent's position that PRRA Officers are entitled to rely on the prior negative credibility findings of the RPD, I take no issue with the respondent's submissions to this effect. Justice Elizabeth Walker recently noted that "[t]he PRRA Officer was entitled to rely on the RPD's prior negative credibility findings in relation to [claims that were before the RPD]" (*Perampalam v Canada (Citizenship and*

Immigration), 2018 FC 909 at para 20; also see *Sani v Canada (Citizenship and Immigration)*, 2008 FC 913 at para 23.)

[18] However, I am of the view that this is of little assistance in this case. The PRRA Officer's only reference to credibility findings before the RPD occurs prior to the analysis of the evidence. The PRRA Officer notes the "credibility of the applicant's identity was thoroughly impugned by the panel" and then concludes that "identity is not at issue in this PRRA." Based on the Officer's statements, I am not persuaded that credibility was at issue for the PRRA Officer; rather, the issue in play was one of sufficiency of evidence. This is not unlike the circumstances in *Kahsay v Canada (Citizenship and Immigration)*, 2017 FC 116, where Justice Sylvie Roussel stated the following:

[20] I am not persuaded by the Applicant's argument ... that the PRRA Officer's use of the words "objective corroborative evidence" amounts to a credibility finding. While the Respondent conceded that the PRRA Officer's reference to the issues before the RPD in the decision's background information is confusing, I agree with the Respondent that credibility was not an issue for the PRRA Officer in his decision. Although the PRRA Officer made reference to the RPD's credibility finding with respect to identity, the operative conclusion was that the Applicant had not provided sufficient objective documentary evidence to establish a personalized, forward-looking risk upon return. [Emphasis added.]

B. *Assessment of personalized evidence of risk and state protection*

[19] In assessing the applicant's personalized risk, the Officer rejected the evidence that he would be targeted by gangs upon return to El Salvador on the basis that his cousin's evidence did not identify any objective basis upon which to conclude he was being actively sought by gang members and that no other evidence was advanced to indicate this was the case.

[20] The Officer's assessment, in my view, reflects a misunderstanding of the stated risk. Mr. Dinartes' cousin's evidence, based on her professional knowledge and experience as a police officer, was that as a family member of a police officer targeted by a criminal gang, Mr. Dinartes was at risk of being targeted.

[21] The cousin's evidence was consistent with the objective country condition documentation. The UNHCR's *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador* [UNHCR Guidelines or Guidelines] identifies various profiles of individuals at risk in El Salvador, a number of which are relevant to Mr. Dinartes:

- A. Persons perceived by a gang as resisting its authority, which includes people who have refused to join a gang;
- B. Former members of the police and armed forces; and
- C. Family members of all the listed risk profiles, including when the person initially targeted has already fled the country or been killed.

[22] The Guidelines further state that “[d]eportees are reported to be easily identifiable by gang members at the point of return to El Salvador.” In the circumstances, it is illogical to conclude that the cousin's evidence of risk is not objectively corroborated by the documentary evidence. The respondent's suggestion that documentary evidence only establishes that those meeting the stated profiles *can* be at risk suggests a burden of certainty must be met. This far exceeds the standard an applicant must demonstrate. Risk by definition refers to a *possibility* of something happening. Outcomes that are certain are not “risks.”

[23] It appears that the Officer's finding that the risk was speculative was not related to the applicant's profile, but rather the lack of evidence that the criminal gang was actively seeking him out. In other words, it appears the PRRA Officer concluded that Mr. Dinartes was required to demonstrate not only that he satisfied the profile of someone at risk but also that the criminal gang had actively been seeking him out in El Salvador.

[24] The difficulty with the PRRA Officer's reasoning is the absence of any evidence to the effect that criminal gangs in El Salvador operate in this manner. Absent some objective evidence to indicate this is the case, the PRRA Officer was simply engaging in impermissible speculation, and in doing so imposed an impossible burden on Mr. Dinartes (*Venegas Beltran v Canada (Citizenship and Immigration)*, 2011 FC 1475 at para 8; *Aguilar Zacarias v Canada (Citizenship and Immigration)*, 2012 FC 1155 at para 12; *Martinez Giron v Canada (Citizenship and Immigration)*, 2013 FC 7 at para 27).

[25] Similarly, the PRRA Officer's finding that there was no objective basis for Mr. Dinartes to believe "that the authorities in El Salvador are unable or unwilling to protect him should he require their assistance" is also inconsistent with the documentary evidence. The UNHCR Guidelines discuss how police are usually seen as not providing effective protection from criminal gangs and that even police officers are often concerned that they cannot be protected. The Guidelines also state that often the best police can do is escort someone who has been threatened by a gang out of their neighbourhood. The Refugees International report supports this and also states that police can be complicit in gang violence. It was open to the Officer to give Mr. Riveras' evidence little weight; however, I note his evidence on the issue of state protection

was entirely consistent with the objective documentary evidence. The Officer's reliance on police action in responding to a threat from a criminal gang involving Mr. Dinartes' cousin, a serving police officer, cannot reasonably be used as a basis to suggest Mr. Dinartes would benefit from a similar degree of assistance.

[26] The PRRA Officer's risk assessment and state protection analysis do not reflect the required elements of justification, transparency, and intelligibility, and as a result, I am unable to conclude that the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law.

[27] In light of my conclusion that the Officer's analysis and decision is unreasonable, I need not consider Mr. Dinartes' alleged breach of fairness.

VI. Conclusion

[28] The application is granted. The parties have not proposed a question of general importance and none arises.

JUDGMENT IN IMM-1139-18

THIS COURT'S JUDGMENT is that:

1. The application is granted;
2. The matter is returned for redetermination by a different decision-maker; and
3. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1139-18

STYLE OF CAUSE: JOSE RIGOBERTO DINARTES v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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