Federal Court  Cour fédérale

Date: 20220405

Docket: IMM-169-21

Citation: 2022 FC 476

Toronto, Ontario, April 5, 2022

PRESENT: Madam Justice Go

BETWEEN:

DASHAD RODTICKO DARVILLE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Dashad Rodticko Darville [Applicant] is a citizen of the Bahamas. He entered Canada at the age of 17 with his family and together they made refugee claims in July 2016, after one of their family members, Samantha, was found dead in May 2015. The Applicant's family suspected Samantha was killed by a member of the Fire and Theft Gang [Gang] in the Bahamas.

[2] The Applicant and his family alleged that Samantha's killer threatened to kill them if they went to the police. Following this threat, they were constantly harassed by members of the Gang. In June 2016, three men attempted to shoot at the Applicant and his father.

[3] The Refugee Protection Division [RPD] refused their claim in November 2016, the determinative issue being the availability of state protection in Bahamas. The Refugee Appeal Division [RAD] agreed that state protection was available and dismissed their appeal in April 2017. The Federal Court granted leave for judicial review but the application was ultimately dismissed: *Johnson v Canada (Citizenship and Immigration)*, 2017 FC 1024 [*Johnson*].

[4] The Applicant submitted an application for permanent residence on humanitarian and compassionate grounds [H&C] in November 2017, which was refused in July 2018. He was offered his first Pre-Removal Risk Assessment [PRRA] in April 2018 made pursuant to s. 96 and s. 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The Applicant's first PRRA was rejected in June 2018, on the grounds that he had no nexus to a *Convention* ground and that there was little evidence of the Gang specifically looking to harm him.

[5] Thinking that the "Canadian government will only listen if someone is killed", the Applicant decided to "sacrifice for my family" and returned to the Bahamas in December 2018. His family remained in Canada. Shortly after he left Canada, an application for leave and judicial review of the H&C and PRRA decisions was filed. The application was discontinued in June 2019, and the H&C was set aside and referred to a different officer for redetermination.

[6] The Applicant alleges that while he was in the Bahamas, he learned that the Gang was occupying his family home. The Gang tried to get into his uncle's house where the Applicant was staying and fired shots in the back yard on July 8, 2019. The police had not responded to previous calls by his uncle. The Applicant fled to Cat Island and on July 25, 2019, he was chased by the Gang, had rocks thrown at him, was threatened with a gun, and injured his back while falling down a steep hill. After his fall, he laid low for about an hour, feeling he could not go to the police station as it was about an hour away by foot.

[7] Five days later, the Applicant fled to Canada. He attempted to make a refugee claim but was not eligible due to his previous claim. He was offered another PRRA in August 2019.

[8] His second PRRA was rejected by a Senior Immigration Officer [the Officer] of Immigration, Refugees and Citizenship Canada, dated April 3, 2020 [the Decision]. The Officer found that the Applicant had not provided corroborating evidence that would be expected, and had not rebutted the presumption of state protection.

[9] The Applicant seeks judicial review of the Decision. I grant the application based on the reasons set out below.

II. Issues and Standard of Review

[10] The Applicant argues that the Decision is unreasonable on the grounds that the Officer (1) relied on externally sourced evidence without giving the Applicant the opportunity to respond to it, and (2) demanded corroborating documentary evidence without making a credibility

finding. The Respondent argues that Decision reasonably concluded that the Applicant did not rebut the presumption of state protection.

[11] The parties both submit that these issues are reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. I would add that issues with respect to procedural fairness are reviewable on a correctness standard.

[12] 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). The onus is on the Applicant to demonstrate that the decision is unreasonable (*Vavilov* at para 100). To set aside a decision on this basis, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

III. Preliminary Issues

[13] There are two preliminary issues.

[14] First, the last name of the Applicant is Darville (not Darkville). The style of cause is thereby amended to reflect the correct spelling of the Applicant's name.

[15] Second, one day before the hearing commenced, counsel for the Applicant filed additional materials to give the Court "a full picture of the matter." The materials are: a) the risk

submissions related to the rest of the Applicant's family's PRRA that was done in 2018 and referred to in the Applicant's submissions for his second PRRA as background, and b) the decisions of the RPD, RAD, and the Federal Court that were referred to in the Decision.

[16] The Respondent did not raise any objection to the filing of these additional materials, but noted that it is unclear if the materials with regard to the first PRRA were before the Officer.

[17] I note that in his submission in support of the Applicant's second PRRA, counsel stated the following in his letter dated October 3, 2019:

> We ask respectfully that the materials we initially submitted for the family need to be reactivated as therein lies the background of the case. However, for ease of reference, I am attaching some information which sets out the horrendous background of this family desperately seeking refuge in Canada due to ongoing risk to their lives caused by members of the Fire and Theft gang in the Bahamas.
>
> We note that we previously sent information about the reach of this gang so we will not repeat that here. We ask that if you needed us to repeat those submissions, let us know and we will surely provide them again.

[18] Based on the above, I accept that the Applicant has sought to rely on his family's previous risk assessments in his PRRA submission. Further, as the Applicant submits and I agree, the additional materials that he is seeking to submit would not be a surprise to anyone. I would thus accept and review these materials as part of my deliberation, where appropriate.

IV. Analysis

[19] The Applicant has raised several issues in this application. In my view, not all of his arguments are equally persuasive. However, I find the Decision was unreasonable because the

Officer erred in requiring corroborating documentation. I thus focus my analysis on this issue and the issue of state protection.

A. *Did the Officer unreasonably require corroborating documentation?*

[20] The Applicant points out that the Officer made no specific finding of credibility, but "seems committed to making the case one of sufficiency" rather than implausibility or credibility. The Applicant submits that the Officer must be aware that they cannot make a credibility finding without putting questions to the Applicant, and thus demanded corroborative evidence instead of directly challenging the veracity of the Applicant's evidence. The Applicant points to *Senadheerage v Canada (Citizenship and Immigration)*, 2020 FC 968 [*Senadheerage*], in which Justice Grammond summarized the case law on when a decision maker can require corroborative evidence:

> [36] To summarize, a decision-maker can only require corroborative evidence if:
>
> > 1. The decision-maker clearly sets out an independent reason for requiring corroboration, such as doubts regarding the applicant's credibility, implausibility of the applicant's testimony or the fact that a large portion of the claim is based on hearsay;
> >
> > 2. The evidence could reasonably be expected to be available and, after being given an opportunity to do so, the applicant failed to provide a reasonable explanation for not obtaining it.

[21] While *Senadheerage* concerned a refugee decision, the case has been followed in the PRRA context as well: *Nadarajah v Canada (Citizenship and Immigration)*, 2022 FC 171 at paras 13, 16.

[22] In *Onyekweli-Ugeh v Canada (Citizenship and Immigration)*, 2021 FC 1138, I looked to Justice Norris' analysis in *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2018 FC 1207 [*Ahmed*] for guidance in distinguishing between "sufficiency" and credibility at para 31:

> [31] …whether the factual propositions the evidence is tendered to establish, assuming them to be true, would likely justify granting the application for protection. If they would not, then the PRRA application failed, not because of any sort of credibility finding, but simply because of the insufficiency of the evidence. On the other hand, if the factual propositions the evidence is tendered to establish, assuming them to be true, would likely justify granting the application and, despite this, the application was rejected, this suggests that the decision maker had doubts about the veracity of the evidence. …

[23] Applying *Senadheerage* and *Ahmed*, I note first of all that the Applicant's refugee claim, along with the rest of his family members, was dismissed on the basis that they have not rebutted the presumption of state protection. Neither the RPD nor the RAD took issue with the credibility of the Applicant or his family members.

[24] I also note that the Applicant provided an affidavit and a statement describing that his family residence was "not in livable conditions" and "has been broken into" by members of the Gang who were "squatting on the property." The Applicant also submitted a sworn statement from his uncle who stated, among other things, that his sister's residence was broken into by "dangers [*sic*] gang members", that group of men were "knocking around" his and his sister's home, and that "going to the police changes nothing and is a waste of time."

[25] Instead of addressing whether these statements, if accepted, would justify the granting of the Applicant's PRRA, the Officer stated that the Applicant "failed to provide objective

documentary evidence in support of his statements. For example, I note photographs of the house, invoices/receipts for renovations and repairs, or police reports have not been brought forward."

[26] I agree with the Applicant that it is not clear why the Officer wanted to see pictures of the home, when he had provided several statements, both sworn and unsworn, from himself and family members stating that the house had been taken over by the Gang. With respect to the repair bills that the Officer noted were lacking, the Applicant submits, which I accept, that nowhere in the evidence did he advise that he had done any repairs – rather, he had submitted that the house was in an unlivable state.

[27] By suggesting that the Applicant failed to provide "objective" documentary evidence, it would appear that the Officer was doubting the veracity of the Applicant's claim, as opposed to making a finding of sufficiency of evidence, in the face of the evidence that was put before him.

[28] *Senadheerage* confirms that, in a case such as this, the Officer should have set out an independent reason for requiring corroboration, and provided the Applicant an opportunity to submit the evidence that the Officer assessed to be missing. That the Officer failed to do so made the Decision unreasonable.

[29] The Officer committed a similar error when he stated that the Applicant had not provided medical documents to corroborate his claim that he injured his back falling down a hill

after being chased by the Gang, even though there was no information about whether the Applicant required medical attention as a result of the fall.

[30] The Respondent argues that the Officer reasonably found that without corroboration, the evidence was insufficient to establish the facts alleged. The Respondent cites *Khansary v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1146 [*Khansary*], in which Justice Annis stated that "while an applicant's evidence is accepted on presentation, the need for corroboration has been recognized as required to enhance its weight when the narrative raises questions of improbability and the applicant's self-interest reduces its probative value" (at para 30). Justice Annis also stated that "a decision-maker may reject a fact or finding based upon insufficient supporting evidence without the need to make credibility findings" if "the party has not made out a probable case to support a fact or finding" (at para 32).

[31] In my view, *Khansary* can be distinguished on facts as the applicant in that case did not provide any evidence – such as sworn statements from his family members – to substantiate his claim. Further, unlike the decision maker in *Khansary*, the Officer in this case made no finding that the Applicant has not made out a probable case.

[32] The Respondent also relies on *Ibrahim v Canada (Citizenship and Immigration)*, 2014 FC 837 [*Ibrahim*] at paras 18-26, in which Justice Strickland reviewed the case law on how to distinguish a disguised adverse credibility finding from an insufficiency finding. Both *Khansary* and *Ibrahim* rely on *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 [*Ferguson*], in which an officer had dismissed a PRRA application on the basis of insufficient

evidence establishing that the applicant was a lesbian, as the only evidence of sexual orientation was a submission of her counsel. Justice Zinn found the decision to be reasonable, rejecting the argument that the officer had made a disguised credibility finding.

[33] Once again, *Ferguson* can be distinguished as the Applicant here did submit evidence beyond the submission of counsel to support his allegations. Similarly, this case is unlike *Ibrahim* where the only evidence was the applicant's unsworn statements in his PRRA submissions (at para 20).

[34] I note also *Nnabuike Ozomma v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1167 at para 52, where Justice Russell stated: "Officers can only avoid credibility findings and decide applications on the basis of sufficiency of evidence if their decisions show that, credibility aside, what the applicant has to say is not sufficient, on the applicable standard of proof, to show that he or she faces a risk under either section 96 or section 97."

[35] As the Officer in this case did not provide any reason to explain why the evidence submitted by the Applicant was insufficient to show that he faces a risk, the Decision was unreasonable either because the Officer was making a veiled credibility finding without providing the Applicant with an opportunity to respond, or because the Decision simply failed to meet the degree of justification, intelligibility and transparency as required by *Vavilov* by failing to provide adequate reasons.

B. *Did the Officer err by finding the Applicant failed to rebut the presumption of state protection in the Bahamas?*

[36] The Respondent raises the issue of state protection by pointing out that in the judicial review of the Applicant's refugee claim, the Federal Court stated that there was "no reasonable basis for the RAD to conclude that the Bahamas is bereft of state protection": *Johnson* at para 8. The Respondent argues that similarly, in the second PRRA, the Applicant failed to fulfil his onus to show that state protection was lacking, and that the Officer reasonably concluded he had not corroborated material aspects of his allegations.

[37] The Respondent also submits that the test for state protection is the same for a PRRA as it was in his refugee claim, which was rejected. The Respondent underscores that there is a presumption of state protection, which the Applicant has the burden to rebut, and that international protection is only a surrogate for where state protection has failed (*Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 [*Carrillo*], *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171). In the Respondent's view, the Officer reasonably found that the Applicant had not met his onus.

[38] The Applicant replies that the determination of state protection in the refugee claim is not binding for all time, and that the Officer should not have relied on the outdated RPD and RAD findings on state protection. The Applicant submits that the Respondent's argument amounts to an indefinite application of RAD and RPD decisions, as once these decisions were made, they would stand no matter what.

[39] However, as the Respondent notes, and I agree, the Officer can also consider new evidence in their analysis of state protection. PRRA Officers should not simply "telegraph" previous decisions without conducting further analysis.

[40] The Applicant submits that the Officer failed to assess evidence of a recent hurricane in the Bahamas and the resultant lack of resources that would make the Applicant and his family "sitting ducks" for the Gang. I note that the Officer did recognize Hurricane Dorian as "one of the worst humanitarian disaster[s] in the history of the Bahamas", but found that "there is little evidence brought forward from the applicant or elsewhere demonstrating there is currently a complete breakdown of the state or of state apparatus." While I do not agree that the Applicant has to show a "complete breakdown of the state apparatus" to rebut the presumption of state protection, I note that other than counsel's submission that the Bahamas has been devastated by the hurricane, there was no evidence before the Officer linking the hurricane to the issue of state protection.

[41] The Applicant added another argument at the hearing that, as the Decision acknowledged, the Applicant is not required to seek state protection if it would be objectively unreasonable to do so in the circumstances. The Applicant further argued that the test for state protection requires an assessment of the adequacy of the protection at an operational level, not whether the state is making efforts to protect its citizens: *Paul v Canada (Minister of Immigration, Refugees and Citizenship)* 2017 FC 687 [*Paul*] at para 17 and *Dawiowicz v Canada (Minister of Citizenship and Immigration)* 2019 FC 258 [*Dawiowicz*] at para 10. The Applicant further argued that contrary to the findings in the Decision, there was evidence from the Applicant that should give

the Officer pause about the availability of state protection. Instead, the Officer simply relied on general statements about the country conditions, without addressing the specific concerns of the Applicant. It is perverse to speak about the absence of documentary evidence, the Applicant argues, when the Officer failed to analyze the evidence before him.

[42] The Respondent, in reply, reiterates that the Bahamas is a democratic country, albeit with a high homicide rate which, in and of itself, does not mean state protection would not be forthcoming if requested. The Respondent further submits that the Applicant has not provided sufficient evidence to rebut the finding of state protection in this particular case, given what has transpired in previous decisions. Citing the Federal Court of Appeal decision in *Carrillo*, the Respondent submits it was the Applicant's responsibility to provide sufficient evidence to rebut state protection.

[43] The Respondent points to the RAD decision, referenced in the Decision, that listed six factors for finding why the Applicant has not rebutted the presumption of state protection. I note one of these factors stated as follow: "None of the Appellants has ever been personally threatened by the alleged agent of harm, nor has any of the Appellants been personally harmed by the alleged agents of harm." Presumably, the RAD (which rendered its decision on November 23, 2016) would not have before it any new evidence contained in the Applicant's PRRA submission.

[44] I acknowledge that the Federal Court of Appeal stated claimants "must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate" (*Carrillo*, para 30).

[45] However, I also note that the Applicant wrote a letter in support of his PRRA, explaining why he could not rely on the police to protect him. He described the incident at Cat Island and then continued:

> After that horrific incident, I knew I had to get out of the Bahamas as soon as possible. They're just waiting for a clear shot, so I try not to be alone if I must go outside for something and I stay low when inside the house. We have bars on our windows but that won't stop a bullet if they see when I'm at in [sic] the house. I shouldn't have to live like that. I had to quit my job so therefore can't even support myself anymore. These men have been after my family since the murder of my Aunt Samantha. Once you report something to the police you are now a target. These men won't stop till they succeed.

[46] The Officer did refer to the Applicant's letter, although he quoted from other parts of the letter instead. The Officer then referred to the incident on Cat Island, with respect to which he questioned why the Applicant did not provide medical documents to corroborate his claim, and why he did not telephone for the police. The Officer found that the Applicant's complaint of the nearest police station being an hour away does not rebut the presumption of state protection.

[47] Overall, I see two errors in the Officer's finding on state protection.

[48] First, the Officer appears to misconstrue the Applicant's explanation for not being able to seek state protection by reducing it to "a complaint about the nearest police station being an hour away." With respect, the letter from the Applicant, and for that matter, the whole tenet of the

Applicant's PRRA submission is that calling the police would not help him, and would potentially lead to more harm.

[49] Second, I note that the Officer's conclusion with respect to the issue of state protection was based largely on his finding that there was "an absence of objective corroborating evidence" in this regard. I also note the Officer's rejection of the statements by the Applicant and his uncle recounting the police failing to attend when called upon as not constituting "clear and convincing evidence of a broader pattern of inability or refusal to extend protection." The Officer then went on to state that "there is little evidence indicating the applicant filed complaints against the police, such as for neglect of duty", and that "the applicant provided little information or evidence indicating that he sought to engage other elements of the state such as a higher policy authority, the Attorney General's officer or similar organizations, as suggested in the Federal Court of Canada's decision."

[50] In *Johnson*, Justice Phelan commented at para 10:

> While not mentioned by the RAD, it is noteworthy that for all the allegations of insufficient protection, none of the Applicants sought to engage other elements of the state such as higher police authority, the Attorney General's office or similar organizations.

[51] The Applicant submits that the comment by Justice Phelan in *Johnson* was merely an *obiter*. He also submits that a letter had, in the past, been sent to the Police Commissioner, and points to his statement before the officer that things get worse when one complains to the police.

[52] The Respondent points out that the letter to the police commissioner pre-dated the first PRRA decision, and thus argues that the Officer properly did not consider this evidence.

[53] It is not clear to me, from the reading of the Decision, however, what the Officer's reasons were for rejecting the letter to the police commissioner since it was not mentioned. It is also not clear if the Officer was rejecting the letter as not being "objective" evidence, because it was prepared by the Applicant's counsel, just as he has rejected the Applicant's and his uncle's statements as not being "objective corroborating evidence."

[54] My concerns regarding the Officer's errors in requiring corroborative documents when it comes to assessing the risks faced by the Applicant equally apply to the Officer's findings on state protection. In both cases, the Officer is seeking "objective corroborative evidence" without explaining why he rejected the evidence submitted by the Applicant as insufficient. While I agree with the Respondent's general proposition that the Applicant bears the responsibility to provide sufficient evidence to rebut state protection, in this case, the lack of analysis conducted by the Officer as to the Applicant's evidence, as well as specific concerns regarding state protection on an operational level, made the Decision unreasonable: *Paul* and *Dawiowicz*.

[55] Ultimately, the Decision lacked the requisite degree of justification, intelligibility and transparency. As such, the only remedy is to set the Decision aside and refer the matter back to a different officer for redetermination.

V. Conclusion

[56] The application for judicial review is allowed and the matter is referred back for redetermination by a different decision maker.

[57] There is no question for certification.

JUDGMENT in IMM-169-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The matter is referred back for redetermination by a different decision maker.
3. There is no question for certification.
4. The style of cause shall be amended to reflect the correct spelling of the Applicant's name.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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