Federal Court  Cour fédérale

Date: 20230210

Docket: IMM-2871-21

Citation: 2023 FC 204

Ottawa, Ontario, February 10, 2023

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

PEDRO ANTONIO CASTILLO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Pedro Antonio Castillo, is a refugee claimant from Cuba who was found inadmissible on grounds of serious criminality because he was convicted of drug offences in the United States of America. He is challenging the rejection of his Pre-Removal Risk Assessment application, which he says failed to take account of the essential facts of his claim.

[2] For the reasons that follow, this application for judicial review will be dismissed.

I. Background

[3] The Applicant is a citizen of Cuba, born in 1974. He left Cuba when he was six years old, together with his family. He says that he faces a risk if he is returned to Cuba because he belongs to a family that opposes the Castro brothers' regime and wishes to see it replaced with a democratic regime that respects human rights. Cuban authorities imprisoned his grandfather and brother because of their political views. He says that other family members were threatened, imprisoned, and tortured physically and psychologically in Cuba. This led to his family's departure from Cuba to the United States in 1980, facilitated by Mariel Law. The Applicant's uncle continued to oppose the Cuban regime from Florida.

[4] Upon his arrival in Canada in July 2010, the Applicant claimed refugee protection. In October 2010, the Immigration Division (ID) found him inadmissible pursuant to paragraph 36(l)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*], due to serious criminality. In 1999, the Applicant was convicted in the United States of conspiracy to possess with intent to distribute cocaine, for which he was sentenced to 11 and one-half years in prison. The ID found this conviction to be equivalent to the offence of conspiracy in the *Criminal Code*, RSC 1985, c C-46 and trafficking under the *Controlled Drugs and Substances Act*, SC 1996, c 19.

[5] Pursuant to paragraph 112(3)(c) of the *Act*, the Applicant was excluded from refugee protection under article 1F of the *Refugee Convention* for convictions for serious, non-political crimes. The Federal Court dismissed the judicial review of the exclusion determination in September 2012 (*Castillo Reyes v Canada (Citizenship and Immigration)*, 2012 FC 1061.

[6] The Applicant's PRRA application was approved in March 2013, based on the risks identified above. However, because of his criminal inadmissibility and exclusion from the operation of the Convention, the positive PRRA opinion did not mean he was granted refugee protection. Instead, his file was transferred to the Case Management Branch (CMB) of Immigration, Refugees and Citizenship Canada (IRCC) for a final decision. This is commonly referred to as a "Restricted PRRA", and the process was recently described in *Cherednyk v Canada (Citizenship and Immigration)*, 2021 FC 873 at paras 9-10:

> Because he had been reported as inadmissible due to serious criminality, the PRRA was governed by ss 112(3) and 113 of the IRPA. Pursuant to s 112(3) of the IRPA, [the applicant] was no longer eligible for refugee protection in Canada. Pursuant to s 113(e)(i), consideration of the PRRA was limited to ss 96 to 98 of the IRPA and whether [the applicant] posed a danger to the public. This is commonly referred to as a "Restricted PRRA".
>
> [10] A Restricted PRRA is considered in accordance with s 172 of the Immigration and Refugee Protection Regulations, SOR 2002/227. The process consists of two written assessments: a Risk Assessment based on the factors enumerated in s 97 of the IRPA; and a Restriction Assessment based on the factors enumerated in s 113(d)(i). The Minister's Delegate must consider both assessments and any written representations made by the applicant before rendering a decision.

(see also *Tapambwa v Canada (Citizenship and Immigration)*, 2019 FCA 34 at para 3)

[7] The Applicant received the Risk Assessment and the Restriction Assessment in 2014, and for reasons that were never explained, the Applicant's file was not assigned to the Senior Immigration Officer (the decision-maker) until 2020. Given the significant lapse of time, the decision-maker invited the Applicant to provide updated submissions, which he did in August 2020. The Applicant asserted that the risk he faced if returned to Cuba still persisted.

[8] The decision-maker disagreed, concluding on a balance of probabilities that the Applicant is not likely to face a personalized risk as specified in section 97 of the *Act* if he is returned to Cuba. The crux of the reasons is set out in the following passage:

> The applicant left his country of nationality as a very young child and appears never to have returned. It is therefore unlikely that the authorities were aware of his migratory history, when he was settling with his family in the United States, a country where he may have been noted more for his criminal convictions than for other reasons, including the expression of any opposition to the Cuban regime. I note that he has no known personal political activities or personal involvement in any organization and his political views have never been made public in Canada. As he has always kept his political opinion to himself, his return to his country of nationality should not cause him any inconvenience in this respect. For all these reasons, his personal profile and past behavior do not support the idea that he could personally be considered or perceived as an opponent of the Cuban authorities. I also have no information to the effect that the Cuban authorities are aware that the subject made a refugee protection claim in Canada in 2010, nor the reason why he made this claim.

[9] The Applicant seeks judicial review of this decision.

II. Issues and Standard of Review

[10] The only issue in this case is whether the decision is reasonable, which is to be assessed under the framework set out in *Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 [*Vavilov*].

[11] Under the *Vavilov* framework, a reviewing court "is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2 [*Canada*

Post]). The burden is on the applicant to satisfy the Court "that any shortcomings or flaws relied on… are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100, cited with approval in *Canada Post* at para 33).

III. Analysis

[12] The Applicant submits that the decision is unreasonable for two main reasons, both of which revolve around his contention that the Officer failed to grapple with the essential facts of his case. The two issues raised by the Applicant are: (i) the Officer's failure to assess the extra hurdles he will face as a returning Cuban national who has been outside of the country for many years; and (ii) the Officer's failure to address the risks that he faces because Cuban authorities would know about his personal profile, including his and his family's political opposition to the Cuban government. These will be discussed in turn.

A. *The failure to deal with risks arising from Cuba's treatment of returning nationals*

[13] The Applicant contends that he faces extra barriers because of Cuban laws that impose extra requirements on returning nationals who have been absent from the country for more than two years. He says that the Officer's failure to deal with the evidence on this point makes the decision unreasonable, because it shows that the decision did not grapple with a core element of the relevant factual matrix.

[14] The jumping off point for the Applicant's argument is the 2019 United States Department of State Human Rights Report on Cuba, which details various human rights abuses against political opponents of the regime, including measures restricting freedom of movement. In

particular, the Report states: “The government also barred citizens and persons of Cuban descent living abroad from entering the country, apparently on grounds that they were critical of the government or for having ‘abandoned’ postings abroad…”

[15] The findings in this Report are consistent with other documents in the National Documentation Package for Cuba that confirm the process for non-resident Cuban nationals to gain re-entry to the country, including a requirement that they explain both why they left and why they are returning to the country. The Applicant says this would require him to disclose his family’s history, his criminal conviction in the United States, and his unsuccessful refugee claim in Canada.

[16] The Applicant also points to country documentation showing that the laws governing re-entry of Cuban nationals are applied in a highly discretionary or arbitrary manner, and that it is not clear whether Cuban authorities will approve his return. He argues that the Officer selectively quoted from some of this documentation before finding that the Applicant’s return to Cuba was not “fraught with risks” because of the re-entry requirements.

[17] The Respondent submits that this argument cannot succeed because the Applicant did not make these submissions to the Officer, and so the Officer was not required to address them. The Respondent points out that the Applicant was provided an opportunity to make further submissions to the PRRA Officer, given the passage of time, and these additional submissions focus on the risks the Applicant would face if he went back to Cuba rather than the difficulties he might encounter trying to gain approval to return there. Neither the Applicant’s original (2013) PRRA submissions nor the ones he submitted in 2020 make this argument.

[18] In response, the Applicant acknowledges that his submissions did not raise this point directly, but he says the Officer was required to address it because it is, undeniably, a part of the "factual matrix" for his case, and it is dealt with in reports in the NDP that are mentioned as sources the Officer relied on in reaching the decision.

[19] I am not persuaded by the Applicant's argument. There are three problems with it.

[20] First, the Applicant did not raise this in either his original or supplementary submissions to the PRRA Officer. Under *Vavilov*, the Officer's decision has to be responsive to the Applicant's submissions, and it is not unreasonable for the Officer to fail to address a point that the Applicant did not raise. This is particularly relevant here, where the Officer rightly took the extra step of inviting updated submissions from the Applicant, and in light of the fact that he was represented by counsel in this process.

[21] Second, I agree with the Respondent that the Applicant's arguments regarding the difficulties he would face in returning to Cuba are speculative. The fact is that he might be admitted without any problem, especially given the fact that he was only six years old when he left, and absent any evidence that Cuban authorities subject returnees who have been convicted of crimes while abroad to any special treatment. Some of the evidence the Applicant cites makes the point that the recent changes have actually made it easier and simpler for Cuban nationals to return.

[22] Third, there is a degree of circularity in the Applicant's position. The Officer was required to assess his risks under section 97 of *IRPA*; the Applicant alleged that he faced grave

risks from the Cuban authorities. If he is denied entry to Cuba because of the recent changes that the Applicant points to, it follows that he would not face any risks from Cuban authorities. There is no allegation that Cuban government officials would "hunt him down" in Canada or elsewhere. The denial of re-entry would eliminate the risk the Applicant says he faces from Cuban authorities.

[23] The case cited by the Applicant, where it was found that a denial of a right to return could, in itself, amount to an act of persecution (*Thabet v Canada (Minister of Citizenship and Immigration)*, [1998] 4 FC 21 (CA)) deals with different circumstances and is not persuasive here.

[24] For all of these reasons, I reject the Applicant's argument that the decision is unreasonable because it fails to deal with the risks he faced as a returning Cuban national.

B. *The failure to deal with his personal profile*

[25] The Applicant's initial and supplementary submissions to the PRRA Officer focused on the risks he faced because of his own and his family's opposition to the Cuban regime. He noted that his grandfather and uncle had been imprisoned in Cuba, and his family was only allowed to leave under the "Mariel Law" by which the Cuban government granted permission to individuals to leave the country. Although he was only six years old when he left, the Applicant states that the Cuban authorities would be able to discover his family's history and that this would put him at risk if he returned there.

[26] The Applicant points to a number of possible elements that the Officer failed to address. The Officer found that he would not face a risk because his family's activities – and his relatives' imprisonment – occurred a long time ago. The Officer also found that the Applicant had not been an active opponent of the Cuban regime while in the United States or during his time in Canada. However, he says that his political opinion has not changed, and he should not be forced to lie to the Cuban authorities: *Donboli v Canada (Minister of Citizenship and Immigration)*, 2003 FC 883 at para 8.

[27] The Applicant asserts that the Officer failed to give adequate weight to the evidence that the Cuban government takes extraordinary measures to silence its political opponents. He says this makes the decision unreasonable. As stated in *Pimental Colmenares v Canada (Minister of Citizenship and Immigration)*, 2006 FC 749 at para 14: "the law does not require a victim of politically motivated persecution to necessarily abandon his commitment to political activism in order to live safely…" (see also *Buyukasahin v Canada (Citizenship and Immigration)*, 2015 FC 772 at para 26).

[28] In addition, the Applicant asserts that the Officer failed to consider the risk associated with the general level of surveillance of the population in Cuba. Because the Applicant's family was known for its anti-government activism, he says that he might face arrest and detention for "precriminal dangerousness" which Cuban law defines as the "special proclivity of a person to commit crimes, demonstrated by conduct in manifest contradiction of socialist norms."

[29] The Applicant argues that he is not asking the Court to re-weigh the evidence, but rather pointing out the Officer's failure to consider the consequences of the fact that the Cuban

authorities would be aware of his family's history as well as his own political views. He says that the Officer's finding that he might face some "inconvenience" upon his return to Cuba is untenable given the documentary evidence, and that this is sufficient to warrant overturning the decision.

[30] I am not persuaded. The Officer's analysis of this aspect of the case is rooted in the facts, and is reasonable in light of the legal framework.

[31] The Officer properly considered that the Applicant's family history of persecution occurred many years before: his grandfather was imprisoned in 1961 and released in 1974, while his uncle was detained for 18 years before being released in 1981. The decision notes that the Applicant left Cuba with his family when he was six years old, and they had the government's permission to depart, in accordance with the Mariel Law. The Officer found that during the 40 years he was away from the country, the Applicant has no record of publicly expressing opposition to the Cuban regime. The Applicant does not dispute any of these facts.

[32] In light of the facts listed above, the Officer's findings are reasonable. The evidence shows that the Cuban government actively tries to suppress or punish its current political opponents, but the Officer found that the evidence did not demonstrate any such actions against former opposition activists or their relatives. Furthermore, the Applicant has no history of expressing his political views, and so the Officer's finding that he would not have to change his behaviour upon his return to Cuba reflects the evidence in the record.

[33] Finally, the Applicant's submission that he might face detention or arrest for "pre-criminal dangerousness" is not consistent with the evidence. The documents discussing this law show that it is used to prevent activity such as prostitution and public drunkenness, and there is no indication it is used to punish Cuban nationals who have been absent for long periods.

[34] For these reasons, I cannot accept the Applicant's argument that the decision is unreasonable because the Officer failed to take into account his personal profile.

IV. Conclusion

[35] For all of these reasons, the application for judicial review is dismissed.

[36] There is no question of general importance for certification.

JUDGMENT in IMM-2871-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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