Federal Court  Cour fédérale

Date: 20150420

Docket: IMM-6268-13

Citation: 2015 FC 504

Ottawa, Ontario, April 20, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

HEBER SAUL AZURDIA GOMEZ
EVA CAROLINA DE LEON DE AZURDIA
SAIL ERNESTO RAMSES AZURDIA DE LEON
BARBARA NATASHA AZURDIA DE LEON

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] Mr. Azurdia Gomez [the Principal Applicant] is a 36-year-old citizen of Guatemala who, together with his wife and their two minor children [collectively, the Applicants], left Guatemala on May 10, 2005, and eventually arrived in the United States of America. The Applicants lived

in the United States without status until they came to Canada on February 27, 2012, and sought protection the same day, claiming that they would be killed if they returned to Guatemala.

[2] The Applicants alleged that they had opened a small telephone business in September, 2002, and that members of a gang called Mara 18 [M18] soon began extorting them for money, goods, and services. They eventually ceased operating their business because of such extortion on February 27, 2004. A little more than a year later, M18 members tracked them down and demanded money for closing their business without permission. Several incidents of threats and vandalism to their home followed, and on April 13, 2005, the Principal Applicant was confronted by armed gang members who demanded 100,000 GTQ within 10 days to repay the "debt" owed for having closed down the business without their permission or knowledge. A week later the Principal Applicant was assaulted by three M18 members and reminded that he had three days to pay them. A week or so later the Principal Applicant's wife reported the problems she and the other Applicants had with the M18 to the Public Ministry, and about two weeks after that the Applicants fled the country. They claimed that M18 members are still looking for them.

[3] The Refugee Protection Division [RPD] rejected the Applicants' request for Canada's protection in a decision dated August 28, 2013. The Applicants now seek judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], and ask that this Court set aside the RPD's decision and return the matter to a different member of the RPD.

II. Decision under Review

[4] The RPD rejected the Applicants' claims for protection, but not because it questioned the truth of their allegations. Before the RPD, counsel for the Applicants had conceded that they were not Convention refugees, and the RPD agreed and found that all they feared was crime which was not connected to any Convention ground. Thus, the RPD dismissed their claim under section 96 of the *IRPA*.

[5] Consequently, the Applicants could only seek protection under subsection 97(1) of the *IRPA*, but the RPD decided that the risk feared by the Applicants was excluded by subparagraph 97(1)(b)(ii) because it was "generally faced by other citizens in Guatemala." The Principal Applicant had testified that every business owner in his neighbourhood had been targeted for extortion, and that those who did not comply were killed. The documentary evidence confirmed that this was so throughout the country, and the RPD said that "[e]xtortion intertwined with demands, physical assaults and threats have been recognized as a generalized risk." The RPD decided that the nature of the risk claimed by the Applicants did not differ from that, and said that this Court has many times upheld decisions of the RPD denying protection to people in similar circumstances (citing *Rodriguez Perez v Canada (Citizenship and Immigration)*, 2009 FC 1029; and others). In this regard, the RPD stated:

> [36] The cases noted above bear very similar characteristics to the case at hand. Considering the jurisprudence and the evidence in this case, I find that the claimants have not established that the risk of actual or threatened violence they face is not faced generally by other individuals in Guatemala. Furthermore, they have not demonstrated that the risk they face is not prevalent or widespread in Guatemala or that it is not a risk faced by a significant subset of the population.

> [37] I find, consequently, on a balance of probabilities, that the risk, which the claimants face, is one that is faced generally by the population of Guatemala. Based on the particular facts of this case, I am not satisfied that the claimants face a particularized risk of harm in accordance with section 97(1) of the IRPA.

III. The Parties' Submissions

A. *The Applicants' Arguments*

[6] The Applicants argue that the RPD failed to properly characterize and analyze the nature of the particular risk they faced, thereby disobeying the two-step process prescribed in *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678 at paragraphs 40-41, [2014] 1 FCR 295 [*Portillo*]. The M18 gang members were not just seeking money; they also relied upon the Applicants' business for communication and telephone services. The Applicants argue that this made the M18 uniquely upset when they closed their business, which is why they went to such great lengths to get revenge. In the Applicants' view, the resulting risk was not similar to that faced by most Guatemalans or even most extorted Guatemalan shopkeepers, and the RPD should have recognized that.

[7] Furthermore, the Applicants claim that the RPD assessed only the prevalence of the initial risk of extortion, and not the risk of retaliation for refusing to comply. In their view, the RPD erred by over-extending the Applicants' testimony about violent reprisals in their neighbourhood to all of Guatemala. Further, the Applicants argue that the risk of reprisal cannot be treated as a mere extension of the risk of extortion (citing *Correa v Canada (Citizenship and Immigration)*, 2014 FC 252 at paragraphs 54-57 and 84, 23 Imm LR (4th) 193 [*Correa*]).

[8] The Applicants also contend that the RPD was unduly selective in its choice of case law. In their view, there are two lines of cases emanating from this Court on the issue of whether personal targeting by a gang is a generalized risk (citing *De Jesus Aleman Aguilar v Canada (Citizenship and Immigration)*, 2013 FC 809 at paragraphs 61-62, 437 FTR 168), which suggests that the case before the Court is a fact-driven one. They say that the RPD erred not only by ignoring the first branch of case law as exemplified by *Aguilar Zacarias v Canada (Citizenship and Immigration)*, 2011 FC 62 at paragraph 17, 95 Imm LR (3d) 187, but also by failing to explain why it only chose cases from the less favourable line and ignored the other completely. The Applicants argue that the facts in their case are most analogous to the cases where the RPD's findings of generalized risk have been considered unreasonable, and submit that the RPD did not reasonably assess the pertinent facts.

B. *The Respondent's Arguments*

[9] The Respondent says that the RPD's finding of generalized risk was neither perverse nor capricious. In its view, the RPD was aware that the Applicants feared not just extortion but retribution, and it specifically found that "[g]angs use violence against those who defy their control … and those who refuse to pay extortion money" (ellipsis in original).

[10] Furthermore, the Respondent says that the evidence shows every business in the Applicants' neighbourhood was targeted. The nature of extortion is to obtain something through force or threats and, thus, the Respondent argues the fact that the demands in this case included not just money but also goods and services is insignificant (citing *Rodriguez v Canada (Citizenship and Immigration)*, 2012 FC 11 at paragraph 87, 403 FTR 1).

[11] According to the Respondent, it is apparent from the decision that the RPD properly characterized the risk faced by the Applicants. As well, the Respondent contends that the RPD considered all of the evidence and the Applicants quibble only with the weight assigned by the RPD to such evidence. In its view, that cannot justify this Court's intervention (citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraphs 12 and 18, [2011] 3 SCR 708).

[12] The Respondent further argues that there is no division in this Court's decisions in cases involving gang violence and extortion. Rather, the case law simply describes two different sets of factual circumstances, and the Respondent says that it was no error for the RPD to refer only to the cases it considered most helpful (citing *Garcia Kanga v Canada (Citizenship and Immigration)*, 2012 FC 482 at paragraphs 7-8 [*Kanga*]). Even if the divergent outcomes were the result of a disagreement about the law though, the Respondent submits that the RPD did not need to explain itself (*Kanga* at paragraph 11). The Respondent emphasizes that the RPD's inquiry under section 97 is "highly factual" and urges the Court to defer to the RPD's decision (citing *Prophète v Canada (Citizenship and Immigration)*, 2009 FCA 31 at paragraph 7, 387 NR 149).

IV. Issues and Analysis

A. *Issue*

[13] The determinative issue in this case is whether the RPD erred by finding that the risk faced by the Applicants was generalized, notwithstanding the fact that they had been specifically targeted by the M18.

B. *Standard of Review*

[14] The applicable standard of review for determining whether an applicant faces a generalized risk is one of reasonableness since it involves questions of mixed fact and law (see, e.g., *Malvaez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1476 at paragraph 10, 423 FTR 210). It is well established that the reasonableness standard is concerned not only with the existence of justification, transparency and intelligibility within the decision-making process, but also with whether the decision under review falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. This Court can neither reweigh the evidence nor substitute its own view of a preferable outcome (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 47-48, [2008] 1 SCR 190; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraphs 59 and 61, [2009] 1 SCR 339).

C. *Did the RPD err by finding that the risk faced by the Applicants was generalized?*

[15] When assessing the Applicants' claims under subsection 97(1) of the *IRPA*, the RPD accepted that the Applicants feared the M18 who had demanded additional money from them for closing their business without the M18's permission. At the hearing before the RPD, the Principal Applicant testified as follows:

> Q. And what do you fear would happen to you, your spouse and your children if you were to return?
>
> A. That they [i.e., the M18] would kill me and that they would kill my children.…
>
> Q. Why do you believe that you were targeted by this gang?
>
> A. Well according to what they told us, it was because we closed the business without their authorization.…

> Q. So, why would this gang still be interested in you today, many years later?
>
> A. Because they feel that I have a debt.

There was also evidence before the RPD that the M18 availed themselves of the goods and services of the Applicants' business and had demanded the Applicants' "collaboration in the manner of allowing them to make national and international phone calls or giving them phone cards for their cellphones."

[16] The RPD here did not reasonably assess the individualized risk to the Principal Applicant and his wife for purposes of section 97. On the one hand, it accepts that the M18 had targeted them personally, since they had closed their business without authorization and owed the M18 a debt; yet, on the other, it concludes that this personal risk is nevertheless generalized, stating as follows:

> [31] … The possibility that the claimants may be identified personally as a target does not necessarily remove them from the generalized risk category, since the nature of the risk is one that is faced generally by others in the country. The nature of the crimes the claimants may be exposed to is widespread in Guatemala and not specific to them. There are many victims of criminal organizations who engage in activities such as extortion and retaliate against non-cooperative victims. The fear the claimants face is not different from that faced by the general public.

[17] The RPD's decision here is not reasonable because it failed to properly conduct the two-step inquiry to assess the Applicants' present and future risk. In this regard, it is instructive to note the Court's decision in *Ortega Arenas v Canada (Citizenship and Immigration)*, 2013 FC 344, where Justice Gleason stated as follows:

> [9] As I held in *Portillo*, section 97 of the IRPA mandates the following inquiry. First, the RPD must correctly characterize the nature of the risk faced by the claimant. This requires the Board to consider whether there is an ongoing future risk, and if so, whether the risk is one of cruel or unusual treatment or punishment. Most importantly, the Board must determine what precisely the risk is. Once this is done, the RPD must next compare the risk faced by the claimant to that faced by a significant group in the country to determine whether the risks are of the same nature and degree.
>
> …
>
> [14] The focus of the second step in the inquiry is to compare the nature and degree of the risk faced by the claimant to that faced by all or a significant part of the population in the country to determine if they are the same. This is a forward-looking inquiry and is concerned not so much with the cause of the risk but rather with the likelihood of what will happen to the claimant in the future as compared to all or a significant segment of the general population. It is in this sense that in *Portillo* I held that one cannot term a "personalized" risk of death "general" because the entire country is not personally targeted for death or torture in any of these cases. There is in this regard a fundamental difference between being targeted for death and the risk of perhaps being potentially so targeted at some point in the future. Justice Shore provides a useful analogy to explain this difference in *Olvera* [*v Canada (Citizenship and Immigration)*, 2012 FC 1048, 417 FTR 255], where he wrote at para 41, "The risks of those standing in the same vicinity as the gunman cannot be considered the same as the risks of those standing directly in front of him".

[18] In this case, the Principal Applicant and his family were not members of the general public targeted at random by the M18. Although other business owners in the area where the Principal Applicant and his wife had operated their business were being extorted, the Applicants had run afoul of the M18 since they closed their business without the gang's knowledge or authorization and thereby incurred an individualized debt that they could not repay. It was not reasonable for the RPD to conclude that the Applicants were still within the generalized risk category.

[19] The nature of the risk or fear faced by the Applicants in this case is not one faced generally by many other business owners in Guatemala or, for that matter, as the RPD stated "the general public." The nature and degree of the risk faced by the Applicants here on a forward-looking basis are not the same as, and in fact cannot be compared to, all or even a significant number of other business owners in Guatemala. Even those business owners who are being extorted by the M18 will not face the risk of death unless they are unable to meet the gang's demands. As noted by Mr. Justice James Russell in *Correa* at paragraphs 83 and 84: "It is an error to conflate the reason for the risk with the risk itself or to ignore differences in the individual circumstances of persons who may be targeted for the same reasons. … It is an error to dismiss reprisals or the carrying out of threats as merely 'consequential harm' or 'resulting risk' stemming from the initial risk of extortion or forced recruitment. The question is not whether others could eventually find themselves in the Applicant's position; it is whether others 'generally' are in that position now." The RPD committed both those errors in this case and the decision must be set aside.

V. Conclusion

[20] As noted above, the RPD here did not reasonably assess the Applicants' individualized risk for the purposes of section 97. This being so, the application for judicial review is hereby allowed and the matter is returned to the RPD for re-determination by a different panel member. Neither party suggested a question for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter returned to the Refugee Protection Division for re-determination by a different panel member. No serious question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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