Federal Court  Cour fédérale

Date: 20150421

Docket: IMM-7486-14

Citation: 2015 FC 517

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 21, 2015

PRESENT: The Honourable Mr. Justice Noël

BETWEEN:

EDILA MAGALY ARTIGA DE HERNANDEZ, JOSUE CRISTOBAL HERNANDEZ ESCOBAR, JOSHUA DEREK HERNANDEZ ARTIGA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review by Edila Magaly Artiga De Hernandez [female applicant], Josue Cristobal Hernandez Escobar [male applicant] and Joshua Derek Hernandez

Artiga [minor son] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of a decision dated October 2, 2014, by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada rejecting the applicants' claim for refugee protection under sections 96 and 97 of the IRPA.

II. Alleged facts

[1] The applicants are citizens of El Salvador, and their minor son is an American citizen.

[2] The male applicant alleges that he worked as a fare collector on a bus that ran between Suchitoto and San Salvador. In November 2008, the bus he was working on was stopped by members of La Mara Salvatrucha [the Maras]. The Maras asked him to hand over the money he had collected that day, and told him that he would have to hand over a certain amount every month from then on or he would be killed. The Maras also demanded that he join their group. After discussing the Maras' demands with the owner of the bus company, the latter agreed to pay the requested amount, treating it as a fee.

[3] The male applicant alleges that on December 28, 2008, after handing over the money to the Maras, the latter increased the amount demanded to US$2,500 per month. The male applicant says he quit the bus company the next day and went into hiding at his uncle's place in El Barrio, Cucatlan, El Salvador, until April 2009.

[4] The male applicant alleges that he returned home in January 2009, and the female applicant informed him that the Maras had come to the house on January 20, 2009, to ask her questions about him, and that they had hit her.

[5] The applicants left El Salvador in April 2009 for the United States, where they remained until April 2012, when they came to Canada and applied for refugee status. On October 2, 2014, the claim for refugee protection was rejected. This is the impugned decision.

III. Impugned decision

[6] The RPD found the applicants' testimony credible. It identified their fear as stemming from the Maras' demands for money from the male applicant, and from their demands that he join their group. The RPD was of the opinion that this fear was not related to one of the Convention grounds under section 96 of the IRPA. No risk of torture was raised. Consequently, the applicants' refugee protection claim was assessed only under paragraph 97(1)(*b*) of the IRPA.

[7] In its analysis, the RPD wrote that the male applicant served as a messenger between the Maras and the bus company, and that he was not required to pay the amount demanded out of his own pocket. It also took into account the fact that the male applicant did not know whether the company had continued to pay the money demanded after he left the company in December 2008. The RPD noted that there was nothing to indicate that the Maras had shown any interest in the applicants for the last five years.

[8] In terms of its assessment of the documentary evidence, the RPD wrote that the issue of criminal gangs in El Salvador, which includes the Maras, is systemic, and extortion is widespread. The RPD believes that despite the fact that the applicants were personally exposed to the risk of death threats while they were in El Salvador, there is nothing to suggest that there is any such prospective risk from the Maras. The RPD added that in view of the documentary evidence in the record, the applicants could be exposed to the same risks faced by the general population in El Salvador if they returned, in terms of criminal actions by the Maras. Thus, the RPD concluded that the adult applicants' refugee protection claims cannot be allowed under paragraph 97(1)(*b*) of the IRPA.

[9] In regard to the minor son, the RPD noted that it was sensitive to his situation, and that he is an American citizen, but that there is no indication that he would be subject to risk under sections 96 and 97 of the IRPA. Accordingly, the RPD concluded that the applicants are not refugees within the meaning of sections 96 and 97 of the IRPA.

IV. Parties' submissions

[10] The applicants affirm that the risk they face is a personalized risk given the threats that the male applicant received from the Maras. The male applicant submits as well that he is not just afraid of the Maras; he is also afraid because he did not collaborate with them. The respondent replies that the RPD's conclusion is reasonable because the determination of refugee status is essentially a prospective exercise, and the RPD noted that the Maras had not shown any interest in the applicants for more than five years. The respondent adds that the documentary

evidence demonstrates that the applicants face a generalized, not a personalized, risk, and that the documentary evidence shows that crime is systemic in El Salvador.

[11] The applicants also argue that the RPD did not mention in its decision the letter from the male applicant's employer, which mentions that the applicants had to leave the country because of the death threats from the Maras. Because this evidence was not assessed by the RPD, the RPD failed to determine whether the male applicant was exposed to a higher risk of harm than that faced by the general population. The respondent replies that the RPD is presumed to have taken into account all of the documentary evidence, and that it was not required to comment on all of it.

[12] The applicants add that the RPD did not take into account the fact that, according to the documentary evidence, the Maras are highly vindictive and are present throughout El Salvador. According to the respondent, the RPD's decision is clear, and it took into account the documentary evidence because it mentions the issues in El Salvador.

[13] The male applicant also claims that the RPD failed to identify the risk he faces and therefore it did not review in detail the death threats he had received. The respondent replies that, contrary to the male applicant's claim, the RPD qualified and determined the risk faced by the applicants and therefore did not commit any error in its analysis.

V. Issue

[14] After reviewing the arguments presented by the parties and their respective records, I would express the issue in dispute as follows:

1. Did the RPD err in finding that the applicants would not be personally exposed to prospective risk under paragraph 97(1)(*b*) of the IRPA?

VI. Standard of review

[15] The issue raised by this case is one of application of the law to the facts in the case. Thus, the standard of reasonableness is the one that applies (*Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213 at para 12; *Roberts v Canada (Minister of Citizenship and Immigration)*, 2013 FC 298 at para 13). This Court will intervene only if the decision is unreasonable in that it does not fall "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

VII. Analysis

[16] Justice Gleason explained the test that is to be applied under paragraph 97(1)(*b*) of the IRPA as follows in *Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678 at paras 40 and 41:

> [40] In my view, the essential starting point for the required analysis under section 97 of the IRPA is to first appropriately

> determine the nature of the risk faced by the claimant. This requires an assessment of whether the claimant faces an ongoing or future risk (i.e. whether he or she continues to face a "personalized risk"), what the risk is, whether such risk is one of cruel and unusual treatment or punishment and the basis for the risk. Frequently, in many of the recent decisions interpreting section 97 of the IRPA, as noted by Justice Zinn in *Guerrero* at paras 27-28, ". . . decision-makers fail to actually state the risk altogether" or "use imprecise language" to describe the risk. Many of the cases where the Board's decisions have been overturned involve determinations by this Court that the Board's characterizations of the nature of the risk faced by the claimant was unreasonable and that the Board erred in conflating a highly individual reason for heightened risk faced by a claimant with a general risk of criminality faced by all or many others in the country.
>
> [41] The next required step in the analysis under section 97 of the IRPA, after the risk has been appropriately characterized, is the comparison of the correctly-described 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. If the risk is not the same, then the claimant will be entitled to protection under section 97 of the IRPA. Several of the recent decisions of this Court (in the first of the above-described line of cases) adopt this approach.

[17] The Federal Court of Appeal also held as follows in *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31 at paragraph 7 [*Prophète*]:

> The examination of a claim under subsection 97(1) of the Act necessitates an individualized inquiry, which is to be conducted on the basis of the evidence adduced by a claimant "in the context of a present or prospective risk" for him (*Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99 at paragraph 15) (emphasis in the original). . . .

[18] The first step in the test that has been developed therefore involves defining the nature of the risk that the male applicant faces. Contrary to the applicants' claims, the RPD adequately defined the risk he faced:

> [TRANSLATION]
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> The panel is of the view that, in light of the evidence in the record, the applicants have failed to establish that they fear persecution related to one of the five grounds under the Convention. Their fear is related to demands for money by the *Maras*, made to the applicant, and their demand that he join their group (Male Applicant's Record [AR], page 8 at para 9).

[19] The RPD analyzed the applicants' situation in terms of whether they faced a persistent and future risk, by assessing whether they still faced a risk in El Salvador and whether they would be personally at risk if they had to return to El Salvador. The RPD asked the male applicant about whether the bus company for which he had worked had continued to pay the money demanded by the Maras after he left. The applicant responded that he did not know. The RPD then asked the applicants whether their respective families knew if the Maras were still looking for them. The applicants had replied that they had not received any indication that the Maras had continued looking for them after they left in 2009. The RPD then took into account the fact that the male applicant had only served as a messenger between the Maras and the bus company, and that the money that the Maras had demanded did not come out of his pocket, but rather out of the bus company's coffers. These findings of the RPD are reasonable.

[20] In addition, the transcript of the hearing shows that the bus company for which the male applicant worked had not existed since at least September 2012 (Certified Tribunal Copy [CTC], page 292, as well as page 288). At the hearing, the RPD also discussed the fact that the male applicant had not had any contact with the owner of the company since he quit, and that the male applicant showed no interest in what had happened to the company since he left (CTC at pages 287-291). The RPD also adequately recognized that the male applicant had personally been

exposed to a personalized risk in the past, but noted that there was no indication that he was still at risk today or would be in the future. Thus, the RPD correctly completed the first step of the test (*Cessa Mancillas v Canada (Minister of Citizenship and Immigration)*, 2014 FC 116 at para 20).

[21] The second step of the test is aimed at comparing the risk faced by the applicant with the risk faced by the general public in El Salvador to determine whether the risks are of a similar nature and degree. In this case, the RPD correctly noted the documentary evidence that the issue of criminal gangs in El Salvador, including the Maras, is systemic and endemic, and that recruitment and extortion efforts are widespread. This type of documentary evidence is not sufficient to ground a section 97 claim absent proof that might link this general documentary evidence to the applicant's specific circumstances (*Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331 at para 17 (*Prophète FC*), appeal dismissed, see *Prophète*, above). Thus, the RPD correctly concluded that the applicants had failed to demonstrate a prospective risk in relation to the Maras and that, in view of the evidence in the record, should they return to El Salvador, the applicants would only be exposed to the same risks, that is to say, criminal actions faced by the population in general. The RPD demonstrated a good understanding of the facts, presented its concerns to the applicants at the hearing and made a reasonable decision.

[22] Moreover, the male applicant's fear, namely, the Maras' demands for money and the demand to join their group, is more closely related to a fear of crime. On a number of occasions, the Court has specified that the fear of crime is a generalized fear, not a personalized one

(*Prophète FC*, above at para 23; *Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213 at para 16).

[23] Moreover, in *Morales Gonzalez v Canada (Minister of Citizenship and Immigration)* 2010 FC 991 (*Morales*), a similar decision to the one before us, the applicant, a man from El Salvador, was forced, under the threat of death, to pay one hundred dollars a month to the Maras. He paid the amounts demanded of him, personally, for eight months before leaving El Salvador with his wife and child for Canada. In that decision, Bédard J. wrote:

> I understand that the applicant is likely to be subject to extortion and threats again from gangs if he returns to El Salvador, but his risk is comparable to that which the general public is subject to. The fact that he has already been a victim of extortion by the Maras is not sufficient to make his risk recognized as a personalized risk, because all citizens of El Salvador are subject to a risk of extortion by gangs. The evidence does not support a finding that a person who has already been a victim of extortion by gangs is more likely to again be subject to extortion. Therefore, I consider that the Board's finding is reasonable: it is based on the evidence, is well articulated and falls within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47) (at para. 18).

[24] It is pertinent to note that in the case before us, the events that prompted the applicants to flee El Salvador happened over a three-month period, from November 2008 to January 2009, compared to the eight months in *Morales*. Moreover, the male applicant in this case was only an intermediary, and was not personally paying the amounts demanded by the Maras, contrary to the situation faced by the applicant in *Morales*. Thus, the RPD made no error in its assessment of the personal risk faced by the male applicant, and of the risks faced by the general population in

El Salvador (*Montano v Canada (Minister of Citizenship and Immigration)*, 2013 FC 207 at para. 11).

[25] Finally, the male applicant claims that the RPD failed to assess the letter from his former employer at the bus company, specifying that he quit the company because he feared for his life, and that it consequently failed to assess whether the male applicant faced a higher risk of harm than the general population. First, the RPD is presumed to have considered all of the evidence in the record (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35 at para 16; *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at para 39) and is not required to comment on all of it (*Herrera Andrade v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1490 at paras 10-11). In this case, contrary to the male applicant's claims, the letter in question was discussed at the hearing before the RPD (CTC page 288). The RPD also specified in its decision that it had taken all of the documentary evidence in the record into account. Thus, the RPD did a complete assessment of the evidence contained in the record during the hearing.

[26] The RPD demonstrated a good understanding of the facts; it shared these concerns with the applicants at the hearing and properly determined that the applicants did not face a personalized risk as defined under paragraph 97(1)(*b*) of the IRPA.

VIII. Conclusion

[27] The RPD applied the correct test under paragraph 97(1)(*b*) of the IRPA. It reasonably concluded that the applicants had not established a current and prospective risk in regard to the

Maras, and that they would only be exposed to the same risk of criminal actions as the rest of the general population in El Salvador. The intervention of the Court is therefore not warranted.

[28] The parties were invited to submit questions for certification, but none were submitted.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed.

2. No question is certified.

"Simon Noël"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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