Federal Court  Cour fédérale

Date: 20180619

Docket: IMM-5233-17

Citation: 2018 FC 634

Ottawa, Ontario, June 19, 2018

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

ADA LUZ MOYA ZUNIGA
KEVIN ALEXANDER HERCULES SORIANO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by the first-named Applicant [the Female Applicant] and her husband [the Male Applicant] pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision made by the Refugee Protection Division of the Immigration and Refugee Board [the RPD], dated October 26, 2017. The RPD determined the Applicants are not Convention refugees or persons in need of

protection [the Decision]. The case turns on the section 97 - persons in need of protection - aspect of their claim because they do not satisfy the requirements of section 96 of IRPA. For the reasons that follow the application is dismissed.

II. Facts

[2] The 31-year-old Female Applicant and 24-year-old Male Applicant are citizens of El Salvador. The Female Applicant left El Salvador for the U.S. in 2010, and the Male Applicant moved to the U.S. in 2012. They were married in the U.S. in July 2017. They entered Canada from the U.S. in August 2017.

[3] The following evidence of both Applicants was accepted as credible by the RPD.

[4] In 2007, a criminal gang [the "gang"] started forming in the Female Applicant's neighborhood in El Salvador. The gang tried to recruit her brother. The Female Applicant stopped her brother from joining the gang. When she tried to physically interfere with her brother joining the gang, she was shoved, insulted and threatened by gang members.

[5] In 2009, the Female Applicant found a weapon in her brother's possession. Gang members gave the weapon to the brother to kill someone, as was required for the gang's initiation process. When the Female Applicant forced her brother to return the weapon, the gang severely beat him and threatened to kill the Female Applicant's father and sexually assault the Female Applicant and her younger sister. A police officer advised her to send her brother out of El Salvador as soon as possible as the gang would kill him. In March 2009, the Female Applicant's brother left El Salvador and entered the U.S. illegally.

[6] The Female Applicant entered the U.S. in 2010, where she lived illegally until entering Canada in 2017. She has not returned to El Salvador.

[7] In January 2017, the Female Applicant's brother was deported from the U.S. to El Salvador, where he resides. According to the Female Applicant, her brother must move around and spends hardly any time in El Salvador because of safety concerns; however, the brother's statement says nothing in this respect. The Female Applicant's father and other brother continue to reside in the same home in El Salvador.

[8] The Male Applicant also claims fear of persecution at the hands of the gang because it tried to recruit him in 2008 and he refused. The Male Applicant, along with his mother and siblings relocated to different places in El Salvador in 2008 and 2009. The gang found him and threatened and harassed him throughout 2010 and 2011 because he refused to join their gang. The Male Applicant also alleges that during that time, the gang threatened his family, and told his mother that if she did not pay them money, they would kill him. Despite changing their telephone number, the gang repeatedly found the Male Applicant's new telephone number and called his home.

[9] In 2012, the Male Applicant left El Salvador for the U.S. His mother and siblings remained in El Salvador for approximately two years before joining him in the U.S.; they were targeted by the gang. He has not returned to El Salvador.

[10] In August 2017, the Applicants entered Canada and made their refugee claims, which were dismissed by the RPD. This judicial review arises out of that decision.

III. Standard of Review

[11] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is not necessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." This Court has already determined that a review of the RPD's treatment of evidence and factual findings are deserving of deference and are reviewable on a standard of reasonableness: *Kgaodi v Canada (Citizenship and Immigration)*, 2011 FC 957 per Russell J at paras 20-21. Reasonableness is also the standard of review for the RPD's determination of whether an applicant's risk is a generalized risk: *Salomon v Canada (Citizenship and Immigration)*, 2017 FC 888 per Locke J at para 11.

[12] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[13] It is well-established that the reasonableness standard of review is a deferential one, such that deference is owed to the RPD: *Ahmed v Canada (Citizenship and Immigration)*, 2016 FC 828 per Boswell J at para 9; *Li v Canada (Citizenship and Immigration)*, 2015 FC 1273 per LeBlanc J at paras 13, 21-22; *Sater v Canada (Citizenship and Immigration)*, 2013 FC 60 per de

Montigny J at para 3; *Hernandez Gutierrez v Canada (Citizenship and Immigration)*, 2012 FC 785 per Shore J at para 20; *Lin v Canada (Citizenship and Immigration)*, 2008 FC 1052 at para 13 per Teitelbaum J. It is for the RPD, not a reviewing court, to assess and weigh the evidence placed before it. This is part of the RPD's core mandate. Judicial review is not the substitution by a reviewing judge of the RPD's assessment of the evidence; judicial review is the determination of reasonableness as that concept is defined by the Supreme Court of Canada in *Dunsmuir*.

[14] It is important to recall as well that the Applicants have the burden to establish they are in need of protection under sections 96 or 97 of IRPA.

[15] The Supreme Court of Canada instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses'*].

IV. Issues

[16] Despite agreeing that the standard of review is reasonableness, the Applicants submit the RPD 'erred' in two respects:

A. Did the RPD err in her assessment of the evidence before her in respect to the Female Applicant's refugee claim?

B. Did the RPD err in her assessment of the evidence before her in respect to the Male Applicant's refugee claim?

[17] In my view the issue is whether the RPD's finding that the Applicants are not persons in need of protection is reasonable? In my view, it is. As a result, this application for judicial review is dismissed.

V. Decision

A. *Credibility*

[18] In finding both Applicants credible; the RPD noted their direct, concise and earnest testimonies.

B. *Insufficient evidence the Applicants face a personalized risk not faced by other Salvadorans*

[19] The RPD's reasoning and conclusion on personalized risk were as follows:

> I have compassion for the [Applicants]. They endured a great deal of hardship in El Salvador and were robbed of childhood and opportunity. They are both bright, articulate and deserving. Having said that, in order for their claims to be accepted, they must demonstrate that they face a serious possibility of persecution based on their race, religion, nationality, membership in a particular social group or political opinion. Alternatively, they must prove that they face a personalized risk to life or cruel and unusual treatment or punishment that is not faced, generally, by other Salvadorans. There was insufficient evidence before me to demonstrate that this is the case today.
>
> In the case of the [Female Applicant], her brother left El Salvador in March 209. Despite the threats against her, she remained in the country until May 2010 without coming to harm. I acknowledge that she had to curb her activities and remain indoors a lot. Her

> brother was deported to El Salvador ten months ago and has not been harmed, though he has been moving around to stay safe. After the [Female Applicant's] 2010 departure, her father and other brother remained in the country and still live in the same place. Her father works in farming and her brother attends university. They have not been harmed in the last eight years, despite the threats against the entire family. There is insufficient evidence that they suffered treatment that amounts to persecution or section 97 risks that would indicate a prospect of serious, sustained or systematic violations of the [Female Applicant's] rights based on a Convention ground. Likewise, there is insufficient evidence to indicate that this would be personalized and unlike one that other Salvadorans face, generally, due to the general security problems there.
>
> Given the lengthy passage of time – seven years since she left the country – and the absence of any evidence of an enduring threat, I am unable to find that she faces a serious possibility of persecution for a Convention reason or a likely personalized risk, even when given regard to the Gender *Guidelines*.
>
> I find that the analysis for the [Male Applicant] is similar. He continued to live in El Salvador for several years after he was first approached for recruitment. He did not come to harm, though I considered that he also had to curb his activity. He is not sure whether his mother paid some extortion, but knows that the gang demanded a sum of money that the family could not afford. After he left the country in 2012, there is no evidence that his mother, brother and sisters, who remained in the country for a couple of years, face harm, including gender-based violence.
>
> The [Male Applicant] has been gone for five years now and there is insufficient evidence before me of an active threat. Though the [Male Applicant] is still young, he has matured beyond the age that gang members in Central America target for recruitment. I find insufficient evidence to demonstrate that the associate claimant would be targeted for one of the Convention grounds or that his risk is one that is something other than what Salvadorans generally face.

C. *Fear is based on criminality*

[20] In this regard, the RPD concluded:

> The [Applicants'] fear today is one based in criminality, which is not a Convention reason. Neither of the Applicants have anything in their profile that would suggest that the past threats against them would carry on because of their race, religion, nationality, membership in a particular social group or a political opinion or a personalized risk, so many years later.
>
> I accept that the [Applicants] are very fearful. I acknowledge that gangsters in El Salvador are brutal and vindictive. I also considered that El Salvador has the highest homicide rate in the world, outside of countries at war. In terms of their profiles, [the Female Applicant] is a woman who encouraged her brother to resist recruitment, and the [Male Applicant] avoided recruitment and his mother did not pay extortion. While these are considered slights to a gang, I have insufficient evidence that the [Applicants'] actions would keep the threats against them active after many years, and would indicate a serious, sustained or systematic violation of human rights based on a Convention ground, or a risk that is not generalized, today.

VI. Analysis

[21] I am unable to conclude that the RPD applied an unreasonable or incorrect legal test either in its approach to section 96 or to section 97 of IRPA. In particular, in my view, there was no material or any evidence to support a claim under section 96 of IRPA. If the claim could be positively considered, it would have to have been under section 97:

Convention refugee	**Définition de réfugié**
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:
(a) is outside each of their countries of nationality and	a) soit se trouve hors de tout pays dont elle a la

is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

Personne à protéger

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be

(ii) elle y est exposée en

faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

[22] I accept the test for section 97 set out by Justice Zinn in *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210 at paras 25-26:

> [25] Subparagraph 97(1)(b)(ii) of the Act defines a person in need of protection as "a person in Canada whose removal to their country or countries of nationality … would subject them personally to a risk to their life or a risk of cruel and unusual treatment or punishment if the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country."

> [26] Parsing this provision, it is evident that if a claimant is to be found to be a person in need of protection, then it must be found that:
>
> a. The claimant is in Canada;
>
> b. The claimant would be personally subjected to a risk to their life or to cruel and unusual treatment or punishment if returned to their country of nationality;
>
> c. The claimant would face that personal risk in every part of their country; and
>
> d. The personal risk the claimant faces "is not faced generally by other individuals in or from that country."
>
> All four of these elements must be found if the person is to meet the statutory definition of a person in need of protection; it is only such persons who are permitted to remain in Canada.

[23] And as Justice Mosley stated in *Coreas Contreras v Canada (Citizenship and Immigration)*, 2013 FC 510 [*Contreras*] at para 16, these cases "turn on their facts."

A. *The Female Applicant's claim*

[24] In the Applicants' submission, the RPD's conclusion is unreasonable and unjustifiable in light of: the RPD's finding the Applicants were credible, the finding that the gang members are "brutal and vindictive", the Female Applicant's sworn testimony regarding the gang's threats of raping and killing her for stopping her adopted brother from joining the gang, and the Applicants' evidence of the sexual assault and 2009 killing of a similarly situated young female friend who also challenged the gang and prevented family members from joining the gang.

[25] However, and with respect, the RPD was entitled and obliged to weigh and assess the evidence of forward-looking risk. There is no reason to doubt that the Female Applicant was in

difficulty in El Salvador when she left in 2010. However, the issue for the RPD was the nature of her risk if she returned to El Salvador in 2017 (the date of the RPD hearing) some seven years later. The duty of the RPD is to assess *forward-looking* risk. This was assessed by the RPD in the following terms:

> […] Likewise, there is insufficient evidence to indicate that this would be personalized and unlike one that other Salvadorans face, generally, due to the general security problems there.
>
> Given the lengthy passage of time – seven years since she left the country – and the absence of any evidence of an enduring threat, I am unable to find that she faces a serious possibility of persecution for a Convention reason or a likely personalized risk, even when given regard to the Gender *Guidelines*. [Emphasis in original]

[26] In my respectful view, the Female Applicant's concerns were addressed by the RPD in light of the evidence. While the Female Applicant disagrees with the assessment, it falls within the range permitted under *Dunsmuir*. This is particularly the case given the absence of evidence that anyone was looking for her or making inquiries as to her whereabouts in the seven years since she left El Salvador to the date of the hearing. Moreover there were no threats made against her or if she were to return to El Salvador. The RPD asked itself the appropriate question namely "likely personalized risk" and found the Female Applicant's case was not made out.

[27] The Applicants acknowledge the RPD is not required to refer to every piece of evidence, and is presumed to have considered all evidence. However, they argue their evidence of a female family friend killed by the gang is relevant such that it "raises the issue that the panel overlooked relevant evidence, failed to consider the totality of evidence or did not provide explanations in clear and unmistakable terms why this relevant evidence cannot be accepted". I am not persuaded this constituted a reviewable error. The event described took place in 2009, eight years

before the hearing. The RPD is presumed to have considered this evidence, and in this context it was open to reasonably assess this evidence as insufficient to demonstrate a continuing intention to harm the Female Applicant, in terms of her forward-looking risk in 2017.

[28] The Applicants submit the RPD failed to provide adequate reasons in clear and unmistakable terms for why the Female Applicant's evidence of being a prisoner in her own home could not be accepted as proof of risk. In my view, this was not required to be specially dealt with in the RPD's assessment and weighing of the evidence.

[29] The Applicants submit that the RPD erred in finding that the Female Applicant's brother was not harmed since being deported back to El Salvador, given the Female Applicant's testimony that her brother spent almost no time at all in El Salvador since being deported due to fear of the gang. The difficulty with this submission is that there was also evidence this brother resided in El Salvador. In addition, while the Female Applicant said he moved around, the brother himself actually said nothing about this in his written statement. Nor did the brother refer to gang threats in his statement. The RPD had the task of assessing the evidence, did so in this case, and came to a conclusion that was open to it on the record.

[30] In connection with the Female Applicant's father and her other brother remaining in El Salvador in the original family home without harm since the Female Applicant left in 2010, the RPD noted that this brother was able to attend university and that the father worked as a farmer. At the hearing, the Female Applicant did not give evidence that her father faced any ongoing threats or harm by the gang, but stated that this brother had to pay it one dollar when he goes out. The brother's statement, however, made no mention of this or other threats or harm to him by

the gang. His statement said that "from his infancy they have lived in the same town and regardless of their difficulties they have managed to get ahead primarily by the help of God and second by the assistance of his older sister […]." It was open to the RPD to prefer the evidence from this brother, noting that he did not mention ongoing harm or extortion by the gang.

[31] In the Applicants' view, the RPD erred in characterizing the risk faced by the Female Applicant as a generalized risk of criminality. The Applicants noted the Female Applicant's risk profile is "drastically different" from that of her father and brother who did not play any active role in preventing the brother from joining the gang and defying it by forcing the brother to return weapons. I agree her profile differs, but her claim under section 97 was dismissed because of insufficient evidence of continuing and forward-looking risk.

B. *The Male Applicant's claim*

[32] The Applicants take issue with the RPD's finding the Male Applicant lived in El Salvador for many years without issue after refusing recruitment by the gang. The Applicants emphasize that their evidence was that the Male Applicant and his family were contacted several times by the gang despite moving within the country. In the Applicant's view, the RPD erred in failing to explain why their evidence of persecution, which the RPD accepted as credible, did not amount to evidence of risk. In my respectful view, the RPD accepted the evidence in this respect, but was not persuaded it amounted to more than general criminality - which does not constitute grounds under section 97 of IRPA (or under section 96).

[33] With respect to the RPD's finding that there was "no evidence" his family "faced harm including gender-based violence", the Applicants direct the Court to the Male Applicant's

evidence that his mother and sister were targeted by the gang after he left; the mother and sister were forced to be the gang members' girlfriends. I agree with the Applicants: this 'no evidence' finding is not supported by the evidence. However, the context of the RPD's finding was that approximately five years had passed since the Male Applicant left El Salvador, and he had by then outgrown the typical age of gang recruits. Moreover, all of his family had left El Salvador by 2016, which was a matter of record. I am not persuaded this finding materially affected the decision in the context of what was before the RPD.

[34] With respect to the RPD's finding that the risk the Male Applicant faces is the same as the risk faced generally by people in or from El Salvador, the Applicants submit the RPD erred, i.e., acted unreasonably. The Applicants note the Male Applicant faced repeated and continuous threats even after he escaped, and the gang continued to threaten and extort him years after he refused them in 2008. However, as with the case of the Female Applicant, there was no testimony about persons looking for the Male Applicant, or making inquiries as to his whereabouts. By the time of the hearing he had been away from El Salvador for five years; the task of the RPD was to assess forward-looking risk if he returned.

[35] The Applicants point to *Contreras* to submit that the continuous threats toward the Female Applicant after her brother escaped to the U.S. were personal risks, risks not faced generally by Salvadorans. However, the facts here diverge widely from those in *Contreras* where the RPD found the applicant faced personal risk to life or cruel and unusual treatment if returned. That is not the evidence or situation here. Likewise, the record respecting the Male Applicant diverges widely from that in *Contreras*.

[36] In summary, the bulk of the Applicants' submissions concern weighing and assessing evidence. Numerous attempts are made to argue that the RPD misconstrued, misunderstood and/or allocated improper weight to evidence. However, per *Newfoundland Nurses'* at para 16, decision-makers are not required to make explicit findings on each piece of evidence. In addition, there is a presumption that decision-makers have considered all of the evidence. I am not persuaded this presumption has been rebutted.

VII. Conclusion

[37] In my respectful view, the RPD weighed and considered the record before it and reasonably found that despite what happened in El Salvador many years ago, there was insufficient evidence the Applicants faced a personalized forward-looking risk to life or cruel and unusual treatment or punishment that is not faced generally by El Salvadorans.

[38] Judicial review is not a matter of adding up the pluses and minuses respecting the various points for or against a decision. The Supreme Court of Canada requires that the decision under review must be looked at as an organic whole. In many cases there are many indeed many indeed multiple possible outcomes; provided they fall within the acceptable range they are to be upheld on judicial review. Stepping back, and reviewing this case as an organic whole, I am not persuaded the decision falls outside the range of possible, acceptable outcomes that are defensible on the facts and law. There are no issues of transparency or intelligibility. Nor was there an issue of procedural fairness. Therefore, I am satisfied the decision meets the tests set out in *Dunsmuir* and judicial review must be dismissed.

[39] Neither party proposed a question of general importance to certify, and none arises.

JUDGMENT in IMM- 5233-17

THIS COURT'S JUDGMENT is that judicial review is dismissed, no question of general importance is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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