Federal Court  Cour fédérale

Date: 20190320

Docket: IMM-595-18

Citation: 2019 FC 343

Ottawa, Ontario, March 20, 2019

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

DELMY LETICIA BURGOS HERNANDEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Delmy Leticia Burgos Hernandez, is a 55-year-old citizen of El Salvador who arrived in Canada from the United States on August 9, 2017. Upon arrival, she claimed refugee protection on the basis that her life was threatened by the Mara Salvatrucha gang. In a decision dated November 24, 2017, the Refugee Protection Division [RPD] of the Immigration and Refugee Board rejected her claim, the determinative issue being the availability of an internal flight alternative [IFA]. The Applicant has now applied under subsection 72(1) of the

Immigration and Refugee Protection Act, SC 2001, c 27, for judicial review of the RPD's decision. She asks the Court to set aside the decision and return the matter for redetermination by another member of the RPD.

I. Background

[2] In El Salvador, the Applicant volunteered with Saint Vincent De Paul, encouraging children to go to church and stay in school and not join a gang. On October 1, 2016, she attended Comunidad San Francisco (a slum and known gang area controlled by the Mara 18) with a nun to hand out toys, food and piñatas to children. While there, some Mara 18 gang members approached the Applicant and threatened her life, saying that she and the nun brainwashed children into thinking they should not join their gang. She stopped going into the Mara 18 gang territory after this threat and received no further threats from the Mara 18.

[3] In early December 2016, a young man in a short sleeve shirt with a tattoo identifying him as a member of the Mara Salvatrucha gang approached the Applicant when she was in a park. This man threatened the Applicant because she had entered the "enemy territory" of the Mara 18 gang. Subsequently, in May 2017, the same man confronted the Applicant when she was coming out of a church. He came at her with a knife, pressed it into her abdomen, and threatened to kill her. The Applicant was scratched on her abdomen with the knife but managed to run away and escape.

[4] After the incident at the church, the Applicant claims she was traumatized and horrified, and unable to leave her house, fearing for her life. In July 2017, she spoke with her sister who

lived in Canada and, later that month, she purchased a plane ticket to travel to Canada. The Applicant left El Salvador in early August 2017, arriving in New York City where she stayed for a few days before arriving in Canada at the Niagara border on August 9, 2017.

II. The RPD's Decision

[5] After summarizing the Applicant's allegations, the RPD stated that the determinative issue in the claim was the availability of an IFA. The RPD identified the legal test for an IFA based on the two-prong analysis as set out in *Rasaratnam v Canada (Minister of Citizenship and Immigration)*, [1992] 1 FC 706, [1991] FCJ No 1256 [*Rasaratnam*]. The first requirement in *Rasaratnam* is freedom from persecution in the proposed IFA, and the second is the reasonability of refuge for a claimant in the IFA. The RPD noted that the onus was on the Applicant to prove actual and concrete evidence of conditions which would jeopardize her life.

[6] The RPD found that the Mara 18 gang did not harass the Applicant after she stopped going into their territory and that she no longer faced a threat from this gang. In the RPD's view, it was more likely than not that the danger to the Applicant lay with the young man who threatened her and not with the entire Mara Salvatrucha gang. As the young man was not sufficiently motivated and did not have the ability to seek out the Applicant if she were to move cities, the RPD found there was no risk to the Applicant in San Miguel.

[7] The RPD noted that the young man did not seek out the Applicant to threaten her, and that he had simply seen her in a park one day and recognized her as the woman who had entered Mara 18 territory. The RPD also noted that after this man threatened the Applicant for a second

time when he ran into her as she was leaving a church, she was able to remain safe until she left El Salvador.

[8] The RPD was not persuaded that the Applicant was a person of interest to the entire Mara Salvatrucha gang. It found the evidence established that one young man from the gang threatened her on two occasions because he happened to run into her, and that he was not continuing to search for her or to threaten her. On the first prong of the IFA test, the RPD concluded that the Applicant would not run into this young man in San Miguel and that she would be safe living there.

[9] In assessing the second prong of the test, the RPD began by noting there is a very high threshold for finding an IFA unreasonable and, for an IFA to be unreasonable, a claimant must demonstrate that travelling to or relocating to the IFA would endanger their life and safety. The RPD found the Applicant had not established that there would be a threat to her life and safety in San Miguel or that San Miguel would be an unreasonable IFA.

[10] The RPD observed that San Miguel is three hours away from San Salvador, and that the Applicant had a brother living in San Miguel who was able to support her financially. The RPD further observed that the Applicant's disabled sister moved from San Salvador to live with her brother in San Miguel after the Applicant left El Salvador. The RPD noted that the Applicant had testified there was no reason she could not live in San Miguel, other than she might be found by the gang. The RPD concluded on the second prong of the IFA test that the Applicant had not discharged her burden of establishing that San Miguel was an unreasonable IFA.

III. Analysis

[11] Determinations on the availability of an IFA are reviewed on the reasonableness standard (*Tariq v Canada (Citizenship and Immigration)*, 2017 FC 1017 at para 14, 285 ACWS (3d) 143); and, as the Court noted in *Lebedeva v Canada (Citizenship and Immigration)*, 2011 FC 1165 at para 32, [2011] FCJ No 1439, such determinations "warrant deference because they involve not only the evaluation of the applicant's circumstances, …but also an expert understanding of the country conditions involved" (also see: *Rodriguez Diaz v Canada (Citizenship and Immigration)*, 2008 FC 1243 at para 24, [2009] 3 FCR 395, and *Sivasamboo v Canada (Minister of Citizenship and Immigration)*, 87 FTR 46 at para 26, [1994] FCJ No 2018).

[12] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708).

A. *The Applicant's Submissions*

[13] The Applicant says the RPD made findings based on speculation and conjecture in assessing the viability of the IFA. In the Applicant's view, the RPD failed to consider country condition documentation in assessing the IFA.

[14] According to the Applicant, the RPD's finding that there was no evidence the Mara Salvatrucha gang was looking for her was unreasonable because, during the second attack, the Applicant says the young man stated: "I finally see you again mother fucker. Where have you been? You went to press charges against us, did you? We found out! I am going to kill you!".

[15] The Applicant claims she tried to limit her exposure by isolating herself. She indicated in her Basis of Claim form and during her oral testimony that, after the first attack, she isolated herself, stopped all volunteer activities, and spent most of her time in her house, and that after the second attack, she did not leave her house until she left El Salvador.

[16] In the Applicant's view, item 7.13 of the National Documentation Package [NDP] for El Salvador is explicit that gangs exert their influence throughout the country and they are very diligent in controlling their territories and frequently question newcomers. The Applicant points out that this item also shows that when individuals move from one gang territory to another they are frequently killed, and if they move that information is shared.

[17] According to the Applicant, item 1.5 of the NDP states that both the Mara Salvatrucha and Mara 18 gangs have the operational capacity to carry out attacks in any part of El Salvador irrespective of territorial control. The Applicant notes that item 7.2 of the NDP states that individuals try to stay with family members when hiding from a gang, but they often run out of options because the country is so small.

[18] The Applicant says the RPD member engaged in speculation by finding that the "young man from the gang threatened her on two occasions because he happened to run into her." The Applicant complains that the RPD failed to consider why there were no attacks upon the Applicant between the first and second attack, and no attacks after the second attack. Determining that there was no persuasive evidence she was a person of interest to the entire Mara Salvatrucha gang was, in the Applicant's view, a matter of conjecture by the RPD member.

[19] According to the Applicant, the RPD member erred in law in failing to analyze and consider the country conditions in El Salvador when assessing a potential IFA. When the country conditions are analysed, the Applicant says an IFA for her is non-existent. The Applicant notes that, since she might be found by the gang in San Miguel, this is precisely why a possible or proposed IFA is not viable.

B. *The Respondent's Submissions*

[20] According to the Respondent, an IFA is inherent in the definition of a *Convention* refugee or person in need of protection, and a claimant has the onus to prove there is no part of a country which they are fleeing where they can avoid persecution or a risk to their life.

[21] In the Respondent's view, the RPD's findings that there was no evidence presented to show that the young man or any other gang members continued to search for the Applicant, and that she was not a person of interest to the entire Mara Salvatrucha gang, were not speculative. According to the Respondent, the RPD did not make a finding that the assailant who threatened and attacked the Applicant in the park and by a church only happened upon her by mere chance.

[22] The Respondent says the RPD's findings were reasonable because: (i) the assailant did not seek out the Applicant nor did he follow her home despite being only four houses away in the first attack; (ii) there were six months between the assailant's first harassment and his second assault upon her; and (iii) after the second attack the Applicant was able to remain safe in her home for another two months before travelling to Canada.

[23] The Respondent maintains that the RPD's assessment of the IFA was reasonable considering the Applicant's personal circumstances, specifically that:

- she feared a gang that operated in her original home town of San Salvador;
- her brother provided financial support when she lived in San Salvador;
- one of her brothers lived in San Miguel;
- San Miguel was only three hours away from her original home in San Salvador;
- her disabled sister was living with her brother in San Miguel;
- there was no reason to doubt that her brother, who had supported her financially throughout her life, would continue to provide financial support should she return to El Salvador; and
- she had testified that "there was no reason she could not live in San Miguel, other than she might be found by the gang".

[24] According to the Respondent, the Applicant does not have the risk profile of someone who is of interest to the Mara Salvatrucha or Mara 18 gangs, and she failed to provide persuasive evidence that either gang had a meaningful interest in her. The Respondent says the RPD was well aware of all the evidence since the Applicant's lawyer summarized it at the conclusion of the hearing.

C. *Was the RPD's decision reasonable?*

[25] I agree with the Applicant that the RPD engaged in conjecture or speculation in finding that the threats were made by an individual gang member only and were not representative of the Mara Salvatrucha gang's interest in the Applicant, and that the two attacks upon her were only because of chance or coincidental meetings.

[26] The RPD's finding that the Mara Salvatrucha gang was no longer a threat was not reasonable. The country conditions evidence shows that an individual targeted by a gang can often protect themselves in El Salvador for a period of time by hiding in their own home or not entering another gang's territory. This is effectively what the Applicant did. She largely sequestered herself in her home after the first attack. She completely sequestered herself after the second attack and did not leave her home until she departed El Salvador. It was unreasonable, in my view, for the RPD not to consider why there were no attacks upon the Applicant between the first and second attack, and no attacks after the second attack.

[27] I also agree with the Applicant that it was unreasonable for the RPD not to analyze and consider (or, for that matter, even mention) the country conditions in El Salvador in the process

of assessing a potential IFA. The documentary evidence clearly shows that the Mara Salvatrucha gang exert their influence throughout the country and that they have the operational capacity to carry out attacks in any part of El Salvador irrespective of territorial control. It is impossible to determine from the RPD's reasons whether there was any possibility that the Mara Salvatrucha gang might find the Applicant in San Miguel.

[28] It is, of course, well-established that a decision-maker such as the RPD is presumed to have "weighed and considered all the evidence presented…unless the contrary is shown" (*Boulos v Public Service Alliance of Canada*, 2012 FCA 193 at para 11, [2012] FCJ No 832, citing *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 at para 1). A failure to refer to some relevant evidence will not typically justify a finding that the decision was made without regard to the evidence, prompting the Court to grant relief as contemplated by paragraph 18.1(4) (d) of the *Federal Courts Act*, RSC 1985, c F-7.

[29] This is not always the case though, since "…the more important the evidence that is not mentioned specifically and analyzed in the…reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact 'without regard to the evidence'" (*Hinzman v Canada (Citizenship and Immigration)*, 2010 FCA 177 at para 38, [2010] FCJ No 838, citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17, 157 FTR 35).

[30] In this case, the RPD made no mention whatsoever as to the country conditions in assessing the IFA. It did not consider whether the conditions were such that a gang like the Mara

Salvatrucha gang had the capacity to find the Applicant in the IFA. Nor did it assess whether there was no more than a mere possibility that the Applicant might be threatened or attacked by the Mara Salvatrucha gang in San Miguel.

IV. Conclusion

[31] The Applicant's application for judicial review is allowed. The RPD unreasonably assessed the evidence as to whether it was objectively reasonable for the Applicant to seek refuge in San Miguel.

[32] Neither party raised a serious question of general importance; so, no such question is certified.

JUDGMENT in IMM-595-18

THIS COURT'S JUDGMENT is that: the application for judicial review is granted; the decision of the Refugee Protection Division of the Immigration and Refugee Board dated November 24, 2017, is set aside; the matter is returned for redetermination by a different member of the Refugee Protection Division in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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