Federal Court  Cour fédérale

Date: 20190404

Docket: IMM-3658-18

Citation: 2019 FC 404

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, April 4, 2019

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

YEISY NOLI ALCANTARA MORADEL,
EMELY DAYANA MARTINEZ ALCANTARA

Applicants

And

THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Yeisy Noli Alcantara Moradel [the Principal Applicant] and her daughter, Emely Dayana Martinez Alcantara [Emely], are both Honduran nationals. They have been in Canada since August 2017, after spending about ten years in the United States. They are challenging, through

this judicial review, the pre-removal risk assessment [PRRA] conducted by an immigration officer [Officer] on June 11, 2018. In the assessment, the Officer concluded that in the event of a return to Honduras, the applicants were not likely to face more than a mere possibility of persecution within the meaning of section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] or to be exposed to a danger of torture, a risk to their lives, or a risk of cruel or unusual treatment or punishment within the meaning of section 97 of the Act.

[2] The applicants allege that the Officer has breached a number of rules of procedural fairness. They also criticize the Commission for treating their application for a PRRA as if it were based exclusively on section 97 of the Act. Finally, they argue that the Officer failed to assess the application on the basis of the best interests of Emely, who was 17 years old at the time the application was processed.

II. Background

[3] The facts of this application for judicial review can be summarized as follows. The Principal Applicant claims that the problems that led her to leave Honduras began in April 1997 with the death of one of her brothers, who was a police officer and who was allegedly murdered by a fellow police officer working for street gangs in response to his role in the arrest of a member of one of these groups. In the year following her brother's death, she was subjected to death threats solely because she was his sister. This prompted her to move to the country's capital. It was there that she meet the man who would become her husband and with whom she would have Emely.

[4] In 2002, the family was unable to have a normal life because of the fear felt by the Principal Applicant, so they decided to leave Honduras for Nicaragua, which is the husband's country of nationality. However, the Principal Applicant alleges that in 2004, her husband had to leave Nicaragua due to political problems. The applicants followed two years later. The family then settled in the United States, where they lived to 10 years, without status, giving birth to two more children.

[5] In June 2017, the family entered Canada and filed a refugee protection claim, which was found inadmissible under the Safe Third Country Agreement. Returning to the United States, the Principal Applicant and her three children were allowed to remain there, but not the husband, who was deported to Nicaragua. A few weeks later, in August 2017, the Principal Applicant and her three children returned to the Canadian border. As on the first occasion, the applicants were found ineligible to make a refugee protection claim, which was not the case for the Principal Applicant's other two children, who were allowed to make such a claim against the United States, their country of nationality.

[6] However, the Canadian authorities offered the Principal Applicant and Emely a PRRA, which they did in November 2017. In support of their application for a PRRA, based on sections 96 and 97 of the Act, the applicants expressed a fear of persecution by MS13 or M18 street gangs if they were forced to return to Honduras. This fear is based on their membership in the family of the Principal Applicant's (murdered) brother and the social group of Hondurans removed from North America. In Emely's case, they said that this fear was also based on her age and the fact that she was a young woman since it made her particularly vulnerable to the

influence of street gangs and the spiral of violence and sexual exploitation generally associated with these groups. The applicants also expressed concern, on essentially the same basis, that they would be exposed to a risk to their lives as well as to risks of cruel and unusual treatment or punishment if they were to return to Honduras. Finally, they urged the Officer to consider Emely's case in accordance with the principle of the best interests of the child.

III. The Officer's decision

[7] The Officer first dealt with the allegation of risk associated with the fact that the Principal Applicant and Emely were members of the family of the Principal Applicant's police officer brother who was murdered in 1997. She gave it little weight, noting that the Principal Applicant's parents and five of her other siblings were still residing in Honduras without being bothered and that 20 years after the event, it seemed highly unlikely to her that the street gang members who ordered this murder were still motivated and interested in searching for the Principal Applicant and her daughter, who was only five years old when she and her mother left Honduras.

[8] The Officer then considered the allegation of risk related to the applicant's membership in the social group of [TRANSLATION] "Hondurans removed from North America". In this regard, she noted that this risk mainly affected young men who had left Honduras to escape the grasp control of criminal groups. She did not see any evidence in the documentation submitted by the applicants that young girls were targeted by these groups upon their return home or that young people in general were systematically targeted because they were returning home from a North American country. The Officer pointed out in this regard that the problems experienced upon

return from a North American country depended on the region or neighbourhood from which the national came and whether or not he or she was already known to a criminal group. She concluded that the applicants did not have a profile of persons who could be specifically targeted by criminal groups upon their return to Honduras and were therefore no more at risk than the rest of the Honduran population.

[9] Thirdly and finally, the Officer considered the allegation that Emely was part of another social group, [TRANSLATION] "Honduran women", and that she would therefore be at risk, upon her return to Honduras, of being kidnapped, raped, and forcibly recruited by members of the MS13 and M18 criminal groups for the purpose of sexual exploitation. She first noted, with statistics for the year 2011–2012, that 73 per cent of Honduran women reported that they had not been victims of violence and that, of the 27 per cent of women who reported having been victims, almost 75 per cent reported having been victims of domestic violence, which was not the case for the applicants.

[10] With respect to the forced recruitment of youth by street gangs, the Officer noted documentary evidence that most of them were young men and that the majority of victims of gang activity were also male. In this regard, she pointed out that poverty, lack of education, dropping out of school, dating, entourage and drug use were all factors that put youth at risk of recruitment by a street gang and that this risk profile did not match Emely's. She expressed the view that the generalized risk was not relevant to the determination of a claimant's refugee status.

[11] The Officer acknowledged that the situation for women in Honduras is far from perfect, but she also noted that most of the problems experienced by Honduran women come from within their families and that programs now exist to provide assistance and support to women that are victims of violence. She concluded the following:

> [TRANSLATION]
>
> In conclusion, looking at all the evidence and the situation of the applicants, I conclude that the risks they face are risks of a generalized nature. Indeed, I am not satisfied that they will be specifically targeted because of their return from North America, that the profile of the applicant's daughter means that she specifically will be forcibly recruited by gang members, or that they are targeted because of their relationship to [the Principal Applicant's brother]. Moreover, I am not satisfied that means the applicant and her daughter will be persecuted for the simple reason that they are women. Indeed, although Honduran women have been victims of violence, the applicants have not demonstrated that this is their case, and the risk that they will be victims in the future remains uncertain.

[12] The applicants refer to three breaches of procedural fairness with respect to the Officer's decision. They argue that she has not carried out a complete analysis of the risks to which they will be exposed in the event that they return to Honduras, by failing to analyse the risk based on Emely's age. They believe that the Officer based her decision on a document from the Immigration and Refugee Board's National Documentation Package that was no longer valid at the time the decision was made. Finally, they criticize the Officer for quoting case law without citing it.

[13] Regarding the merits of the Officer's decision, the applicants argue that the Officer erred in law in its assessment of the section 96 component of the PRRA application by requiring evidence of a personalized risk. As a result, according to the applicants, she was able to treat this

part of the PRRA application as if it were a section 97 application. Finally, the Officer was required, again according to the applicants, to assess the application in the best interests of Emely, which she allegedly did not do.

[14] It should be noted that the applicants do not dispute the Officer's conclusions relating to the allegation that they would be at risk, should they be deported to Honduras, because of their relationship with the Principal Applicant's brother who was murdered in 1997.

IV. Issue and standards of review

[15] The issue here is whether the Officer made an error in her decision that justifies the Court's intervention according to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. It is well established that questions of procedural fairness are reviewable by this Court according to the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

[16] It is also well established that the Officer's conclusions regarding her assessment of the alleged risks in support of the PRRA application are reviewable according to the standard of reasonableness, assuming that the applicable analytical framework has been properly followed (*Tapambwa v Canada (Citizenship and Immigration)*, 2019 FCA 34 at para 32; *Burton v Canada (Citizenship and Immigration)*, 2014 FC 910 at para 34; *Kandel v Canada (Citizenship and Immigration)*, 2014 FC 659 at para 17; *Jama v Canada (Citizenship and Immigration)*, 2014 FC 668 at paras 15-16). An administrative decision maker's decision is reasonable when the process that led to it is transparent and intelligible and the conclusions reached fall within a range of

possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Analysis

[17] In my opinion, there is no reason to intervene with respect to the Principal Applicant's recriminations. First, none of the three alleged breaches of procedural fairness are relevant to her case or merit the intervention of the Court. Indeed, the first of these breaches, namely that the Officer failed to conduct a risk analysis based on Emely's age, concerns only Emely, and not the Principal Applicant.

[18] The second breach, in which the Officer is alleged to have based her decision on a document from the Immigration and Refugee Board's National Documentation Package that was no longer in effect and therefore no longer valid at the time her decision was made, is once again only relevant to Emely's case. This document presents statistics on the murder of women in Honduras, discusses domestic and sexual violence and touches on services for victims. It therefore addresses the general situation of Honduran women (Certified Tribunal Record [CTR], Honduras: Femicide and spousal and sexual abuse, and services provided to the victims (2009-2011) at pp 191-197).

[19] In support of her PRRA application, the Principal Applicant invoked the risks associated with the fact that her brother's murder had been ordered by street gangs because of his membership in a group, namely, Hondurans who have been sent back from North America. However, she does not dispute the Officer's findings regarding her relationship with her brother,

and the document in question does not deal with Hondurans removed from North America. It therefore has no application to the Principal Applicant's case.

[20] Finally, the fact that the Officer failed to indicate the citation to the judgment from which she quoted an extract cannot constitute a breach of the rules of procedural fairness. I agree with the respondent that this is a clerical error and not an error that could invalidate the Officer's decision. This has nothing to do with the effective implementation of the rules of procedural fairness.

[21] As for the reasonableness of the Officer's decision with respect to the Principal Applicant, there remains only the fear related to the fact that the Principal Applicant is part of the group of Hondurans who have been sent from North America, since the Officer's conclusions regarding the risk related to the murder of the Principal Applicant's brother are not in dispute. The main complaint against the Officer is that she failed to examine this allegation from the perspective of section 96 of the Act.

[22] It is well known that the elements required to establish the merits of a claim under section 97 of the Act differ from those provided for in section 96. For the purposes of section 97, the decision maker must consider whether the applicant's removal could expose him or her personally to the risks and threats specified in the section. Risk must be personalized and must be determined on a balance of probabilities. It is prospective and has no subjective component (*Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at para 33; *Jarada v Canada (Minister of Citizenship and Immigration)*, 2005 FC 409 at paras 26-28).

[23] In contrast, where the claim is based on section 96, the claimant does not have to prove that he or she has been or would be persecuted. It is sufficient to show that the fear of persecution arises not from wrongdoing committed or likely to be committed against him or her, but from wrongdoing committed or likely to be committed against the members of a group to which he or she belongs. It is also sufficient to prove that there is a reasonable possibility that the risk of harm associated with this fear may occur, meaning that there is more than a mere possibility that this risk may materialize (*Salibian v Canada (Minister of Citizenship and Immigration)*, [1990] 3 FC 250 at para 17 (FCA); *Dezameau v Canada (Citizenship and Immigration)*, 2010 FC 559 at para 29; *Raza v Canada (Citizenship and Immigration)*, 2006 FC 1385 at para 29).

[24] The applicant must still demonstrate that he or she belongs to the group whose members are at risk of persecution, as the applicant fears (*Fi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1125 at para 16; *Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 1061 at para 28; *Conka v Canada (Citizenship and Immigration)*, 2018 FC 532 at para 17).

[25] The Principal Applicant, who was 40 years old at the time that her PRRA application was reviewed, was unable to demonstrate this because, as the Officer noted, the risk faced by Hondurans sent back to their country from North America concerns, first and foremost, young men who left a violent situation that existed before their departure for North America. After reviewing the documentary evidence provided in the CTR, I cannot conclude that the Officer committed an error in assessment, let alone an error in assessment justifying the Court’s intervention.

[26] Emely's situation is different, where, in my opinion, the Officer confused the analytical frameworks specific to sections 96 and 97 of the Act. As Emely claims, the Officer failed to analyze her fear in light of section 96 of the Act, as a member of the social group of young women in Honduras. In other words, the Officer did not assess Emely's claim for refugee protection on the basis of the persecution she fears because of her age and sex, from the perspective of membership in this group and within the analytical framework specific to section 96 of the Act.

[27] I am aware that a decision maker does not have to make an explicit finding on each element of the reasoning that led to his or her final conclusion, but the reasons for his or her decision must allow the Court to understand why the tribunal made its decision and determine whether it is among the acceptable, possible outcomes in respect of the facts and the applicable law (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

[28] The respondent concedes that the Officer could certainly have better separated her analysis from the criteria of sections 96 and 97 of the Act. However, he argues that the reasons for the decision in question, when considered together as a whole, do not allow us to conclude that the Officer confused the criteria applicable to each of the two components of Emely's PRRA application.

[29] I am not convinced of this. The personalization of risk seems to me to have been at the heart of the Officer's approach and analysis. Therefore, it was focused exclusively on section 97

of the Act. Yet, according to the evidence on file, because of Emely's age (she is still a teenager) and sex, she appears particularly vulnerable as a member of the social group of young women in Honduras.

[30] Honduras with El Salvador and Guatemala form a group of countries nicknamed the "Northern Triangle of Central America", which has the highest homicide rate in the world, due particularly to the phenomenon of criminalized gangs that plague these countries (CTR at pp 74, 81, 122, 142, 147, 150). Adding to the force of this phenomenon is the fact that more than 50% of the victims of these gangs are young men and women under the age of 25 (CTR at p 151).

[31] As for girls and young women in particular, the evidence shows that they are particularly vulnerable to the forced recruitment of these gangs, which often leads to a spiral of exploitation and physical and sexual violence (CTR at p 116). According to the evidence on file, the girls thus recruited often become, under duress, the "girlfriends" of the gang members, which exposes them to various forms of sexual abuse (CTR at p 143). In a report submitted to the United Nations Human Rights Council, the Special Rapporteur on violence against women, its causes and consequences in Honduras notes that girls are forced to engage in sexual intercourse during their initiation into gangs and thereafter are forced to carry narcotics and firearms (CTR at p 242). This report also notes that in addition to being sexually abused, young girls recruited by these gangs are often killed in gang-related incidents (CTR p 242). Although the phenomenon also affects boys, many young girls drop out of school because this is where these gangs do a large part of their recruitment (CTR at p 143). An article by the Office of the United Nations High Commissioner for Refugees reports that the increase in gang violence has forced tens of

thousands of young people from countries in the Northern Triangle of Central America to flee the region, a figure that, in 2016, had increased fivefold in three years (CTR at p 130)

[32] Faced with a situation that seems so critical for young women from a country that appears to be on the verge of social collapse, if the Officer did an analysis of Emely's case under section 96 of the Act, she should have stated the ins and outs of her reasoning and conclusion more explicitly. In my opinion, her failure to do so undermines the intelligibility of her decision and suggests that she did confuse the two distinct analytical frameworks that she had to apply to make a decision on Emely's portion of the PRRA application. The seriousness of the situation called for a certain vigilance, if not a certain vigilance on the part of the Officer. This vigilance seems to have been lacking, which I believe requires the intervention of the Court and a reassessment of Emely's fear of persecution if she is to return to Honduras.

[33] It will not be necessary, in the circumstances, for me to rule on the applicants' other complaints against the Officer's decision relating to Emely.

[34] The application for judicial review will therefore be allowed, but only with respect to Emely. Neither party has proposed the certification of a question for appeal. I am also of the opinion that there are no questions raised in this case that transcend the particular facts of this case.

JUDGMENT in IMM-3658-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed in respect of the co-applicant, Emely Dayana Martinez Alcantara;
2. The pre-removal risk assessment conducted on June 11, 2018, relating to co-applicant Emely Dayana Martinez Alcantara is set aside, and the case is referred back to another officer for reassessment;
3. The application for judicial review is otherwise dismissed;
4. No question is certified.

"René LeBlanc"
Judge

Certified true translation
This 7th day of May, 2019.
Michael Palles, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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