

Federal Court



Cour fédérale

Date: 20131008

Docket: IMM-1296-13

Citation: 2013 FC 1016

Montréal, Quebec, October 8, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**LUIS FERNANDO BUESO TROCHEZ
LESTHER ENRIQUE BUESO TROCHEZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicants seek a judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board, dated January 14, 2013, wherein, it was determined that neither Applicant was a Convention refugee under section 96 nor a person in need of protection under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. Background

[2] The Applicants, Mr. Luis Fernando Bueso Trochez and Mr. Lester Enrique Bueso Trochez, are brothers and citizens of Honduras. They were born and raised in the city of San Pedro Sula.

[3] In 2001, the Applicants' parents immigrated illegally to the United States and left the brothers in the care of their grandmother.

[4] The Applicants began attending the Centro Educativo en Computacion in February 2005.

[5] The Applicants' Personal Information Form [PIF] then indicates:

- a) In March 2005, the Applicant, Mr. Lester Bueso, was approached by members of the Mara Salvatrucha 13 [MS-13] criminal gang outside their school and was badly beaten when he refused to join their gang;
- b) In May 2005, the other Applicant, the younger brother of Lester Bueso, Luis Bueso, faced a similar demand to join the gang and when he refused, he was beaten and stabbed in his upper left arm. This required a visit to the local hospital;
- c) The Applicants' family attempted to file a complaint with the local police; however, without more information, the police advised them that they could not do anything;
- d) The Applicants moved to an aunt's home in San Pedro Sula in June 2005, and then to their grandfather's home in the city of Comayagua in December 2005;
- e) In February 2006, the Applicants decided to leave Honduras for the United States to live with their parents. They traveled through Guatemala and Mexico by car, and on March 16, 2006, successfully, crossed the Mexican-US border by foot at McAllen, Texas.

[6] The Applicants reunited with their parents in Miami and remained in the United States without legal status for over 5 years.

[7] The Applicants arrived in Canada on March 26, 2011 and claimed refugee protection a few days later.

[8] The Applicants indicate that continuing threats made to their brother, German Bueso, have made them fearful to return to Honduras. They feel their family is targeted by the MS-13 gang because they refused to join their ranks in 2005.

III. Decision under Review

[9] The RPD rejected the Applicants' asylum claim on January 14, 2013.

[10] At the outset, the RPD found that the Applicants had not established a nexus to a Convention ground. The Applicants had agreed with this determination in regard to the Convention at the oral hearing, itself, therefore, the RPD did not discuss the matter any further in its decision in regard to a Convention ground (Hearing Transcript at p 17).

[11] Having concluded that a claim under section 96 had not been established, the RPD considered whether the criteria of section 97 of the *IRPA* had been satisfied. The RPD found that the Applicants' evidence was not credible; therefore, they had not established a personal risk to their life or to a risk of cruel and unusual treatment or punishment pursuant to section 97 of the *IRPA*.

[12] The RPD raised the lack of specificity in respect of the Applicants' claim; they could not identify a single member of the gang that had been trying to recruit them, although they alleged they were well-known in their neighbourhood. The RPD also found that it was implausible for the MS-13 to continue to seek the Applicants years after they had left the country. Referring to the documentary evidence, the RPD noted that it did not find that the Applicants fit the profile of youths, recruited by the MS-13, or even that the MS-13's recruitment pattern was, generally, one of forced recruitment.

[13] The RPD also drew a negative inference from a significant inconsistency between the PIF and the Applicants' testimony in regard to when they had left the school where they had been attacked. The Applicants indicated in their PIF that they had withdrawn from school in November 2005; however, at the hearing, the Applicants claimed they left school immediately after the attacks in the spring of 2005. The RPD noted that the date given at the hearing would have been included in their PIF narrative if the allegations had been true as "such actions provide proof of facing risk."

[14] Given these credibility problems and a general lack of evidence corroborating their story, the RPD found that, on a balance of probabilities, the Applicants had not met their burden of establishing that their allegations of risk of torture were true.

[15] In addition to this negative credibility finding, the RPD also found that the Applicants' alleged risk of torture was of a generalized nature, faced by a large number of young people in Honduras targeted by gangs, such as the MS-13. As the risk was of a generalized nature, not

specifically targeting the Applicants, themselves; thus, even if they had been credible, the provision of section 97 would not apply to the Applicants. The RPD cited the cases of *Perez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 345 and *Maldonado Lainez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 707 in support of this conclusion.

[16] Correspondingly, the RPD concluded that the Applicants had not met the burden of establishing that the city of Comayagua was not a viable internal flight alternative [IFA].

IV. Issues

- [17] (1) Is the RPD's credibility determination reasonable?
- (2) Is the RPD's determination that the Applicants faced a generalized risk reasonable?
- (3) Is the RPD's determination that there is an IFA available in Honduras reasonable?

V. Relevant Legislative Provisions

[18] The following legislative provision of the *IRPA* is relevant:

Convention refugee

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,

(a) is outside each of their countries of nationality and is unable or, by reason of

Définition de « réfugié »

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) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du

that fear, unwilling to avail themselves of the protection of each of those countries; or

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

Personne à protéger

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

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 themselves 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 faced by the person in every part of that country and is not faced generally

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou

by other individuals in or from that country,

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.

VI. Position of the Parties

[19] The Applicants submit that the RPD’s credibility determination was not reasonable as it ignored and misconstrued key pieces of evidence; particularly related to RPD’s findings on the MS-13’s recruitment pattern and the Applicants’ profiles.

[20] The Applicants also submit that the RPD erred by giving too much weight to the inconsistency between their PIF and testimony with regard to the date they withdrew from school.

The Applicants maintain that such an inconsistency cannot, in and of itself, support a negative credibility finding.

[21] The Respondent submits that the Applicants did not demonstrate that the RPD's conclusion regarding the absence of credibility of the claim was unreasonable.

[22] The Respondent first emphasizes that it was within the RPD's jurisdiction to use a common-sense approach in determining the credibility of the Applicants and to take into account any discrepancies in their claims (*Shahamati v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 415 (FCA) (QL/Lexis); *Gudino v Canada (Minister of Citizenship and Immigration)*, 2009 FC 457). According to the Respondent, the RPD was equally entitled to reject explanations in respect of discrepancies as they were insufficient to give credence to their allegations (*Sinan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 87 at para 10).

[23] The Respondent further contends that the RPD was open to draw a negative inference from the Applicants' failure to produce documentary evidence by which to corroborate their claims (*Ramirez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 442 at para 15).

[24] Lastly, the Respondent affirms that it was also reasonable for the RPD to draw negative credibility findings in regard to the omissions and contradictions between the facts alleged in the Applicants' PIF and their testimony (*Basseghi v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1867 (QL/Lexis)) at para 33; *Feradov v Canada (Minister of Citizenship and Immigration)*, 2007 FC 101 at para 18).

VI. Analysis

Standard of Review

[25] The applicable standard of review in respect to the weight of the evidence and as to findings of credibility is that of reasonableness (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA) at para 4).

[26] The applicable standard of review as for the second issue, determining whether an applicant faces a generalized risk, is also that of reasonableness as it is a question of mixed fact and law (*Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213 at para 9-11).

[27] Lastly, the standard of review on a question of an IFA is also that of reasonableness (*Agudelo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 465 at para 17).

(1) Is the RPD's credibility determination reasonable?

[28] This Court has repeatedly confirmed that the accumulation of contradictions between an applicant's testimony, port of entry statements and Personal Information Form [PIF], as well as the omission of elements in the PIF, crucial to his or her claim, may legitimately serve as a basis for a negative credibility finding (*Cienfuegos v Canada (Citizenship and Immigration)*, 2009 FC 1262 at para 1).

[29] These findings can also be based on common sense, implausibility and an inherent logic to an applicant's narrative (*Shahamati*, above). When such findings are made, they are dispositive of a

claim; unless the record contains reliable and independent documentary evidence to rebut it (*Sellan v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381).

[30] In the present case, the Court finds that the Applicants' narrative contains a number of important contradictions and implausibilities regarding the central allegations of their claim. The RPD, therefore, had reason to make a negative credibility finding. The negative inferences drawn by the RPD are not just based on "minor or trivial variations or omissions", but, rather, on the central elements of their claim (*Chavez v Canada (Minister of Citizenship and Immigration)*, 2007 FC 10 at para 13-15; *Moscol v Canada (Minister of Citizenship and Immigration)*, 2008 FC 657 at para 21-22; *Nsombo v Canada (Minister of Citizenship and Immigration)*, 2004 FC 505).

[31] In their PIF narrative, the Applicants' stated that they were "afraid to go back to school or even leave the house" after their attacks and moved to their aunt's home in another neighbourhood to seek safety in June 2005 (at para 14, 18); however, they indicated later in their PIF that they continued to attend the school where they were attacked (and persistently harassed) until November 2005. When asked about this contradiction at the oral hearing, the Applicants changed the dates, stating that they had, in fact, both withdrawn from school shortly subsequent to the attacks out of fear of the MS-13. The Applicants were not able to provide a reasonable explanation for this inconsistency between their PIF and their testimony.

[32] In the Court's view, this contradiction seriously undermines their credibility as it is a key detail to their claim; it relates directly to their alleged fear of persecution by the MS-13. The fact that the Applicants would have continued attending school for 6 months, following the attacks,

despite their persecutors forcibly recruiting members at that location, demonstrates a lack of subjective fear of the gang. It is, in the Court's opinion, sufficient to form the basis for an adverse finding on credibility.

[33] The Applicants could not satisfactorily explain to the RPD why they were not able to identify a single member of the MS-13; although, they were allegedly well-known in the community. They also did not provide any objective evidence supporting their explanation as to why they were being targeted by the MS-13 or how the attacks took place (e.g. medical reports, police reports, etc.).

[34] The only documentary evidence provided to the RPD as to the alleged attacks consisted of medical certificates issued by a Montreal medical clinic in 2009 that confirmed that both Applicants had suffered past injuries. The RPD gave this evidence little probative value as it had only recently been obtained and merely repeated a version of the facts that the RPD considered to be implausible; the certificates did not confirm the source of the Applicants' injuries. The RPD was entitled to find that this documentary evidence was insufficient to give credence to the Applicants' narrative; and, therefore, chose to give it little weight.

[35] As stated by this Court on numerous occasions, general findings of lack of credibility can affect all related evidence submitted by an applicant, including documentary evidence, and ultimately cause the rejection of a claim (*Ayub v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1411, at para 8-9; *Nijjer v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1259; *Alonso v Canada (Minister of Citizenship and Immigration)*, 2008 FC 683).

[36] In their written representations, the Applicants mainly criticize the RPD for not having considered specific passages in the documentary evidence prior to contradicting their narratives (see documents in Certified Tribunal Record [CTR] at pp 132, 183). The Court cannot agree with the Applicants' view that the RPD erred in its decision by ignoring or misconstruing this evidence.

[37] The Court is of the view that the RPD's findings were fully supported by the documentary evidence when considered in its totality. It is evident in reading the RPD's decision that it took all of the documentary evidence into account and was aware of its contradictory aspects vis-à-vis the Applicants' evidence. In its decision, the RPD explicitly stated that the "preponderance of research holds that the Mara does not resort to 'forced recruitment'" [emphasis added]; it did not rule that the documentary evidence unanimously pointed to this conclusion, as the Applicants suggest the RPD did. It is also clear that the RPD relied on the documentary evidence in finding that the Applicants did not have a profile that would typically attract the MS-13 (RPD Decision at para 18, 19). Almost all of the objective evidence before the RPD demonstrated that new recruits to the MS-13 are generally from a background of poverty, unemployment and family breakdown (*see Immigration and Refugee Board of Canada, Honduras: The recruitment of Mara Salvatrucha (MS) and 18th Street (Calle 18 or Mara 18) gang members; whether individuals are forced to participate in gang activity (2007-December 2011), CTR at p 132; How the Street Gangs Took Central America, CTR at p 142; Central America and Mexico Gang Assessment, Annex 3: Honduras Profile, CTR at p 165*). Based on the evidence on file, the Court agrees that this profile does not correspond to that of the Applicants.

[38] This being said, the Court nonetheless finds that when read in their entirety (and not only the highlighted excerpts), none of the contradictory passages advanced by the Applicants in their written representations detract from the RPD's conclusions with regard to the MS-13's recruitment pattern or the Applicants' profiles.

[39] The Court finds that the RPD appropriately weighed the evidence, preferring its findings as to the majority of the sources in the country condition documentary evidence to that of the information advanced by the Applicants. This does not constitute a reviewable error. The Applicants are, in effect, asking the Court to reweigh the evidence which was before the RPD; and, to come to a different conclusion. The Court cannot, however, enter into such an exercise.

[40] It was for the RPD, as a specialized tribunal and finder of fact, to weigh the evidence before it and to give it the probative value it considers appropriate. The Court cannot infer that the RPD did not consider all of the evidence before it because it did not refer to every piece of potentially contradictory information submitted in its decision (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35).

[41] Overall, the Court concludes that the RPD's credibility determination falls 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). The Applicants' written representations do not advance any argument that invalidates the RPD's decision.

- (2) Is the RPD's determination that the Applicants faced a generalized risk reasonable? and,
(3) Is the RPD's determination that there is an IFA available in Honduras reasonable?

[42] This Court has long held that an applicant's failure to prove that the RPD's credibility findings are unreasonable is sufficient to defeat an application (*Cienfuegos v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1262 at para 25; *Salim v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1592 at para 31).

[43] As the RPD's decision was centered on a negative credibility finding, the generalized nature of the risk or the availability of an IFA cannot, in and of itself, provide a basis for intervention by the Court. For this reason, these issues need not be examined.

VII. Conclusion

[44] For all of the above reasons, the Applicants' application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicants' application for judicial review be dismissed with no question of general importance to be certified.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1296-13

STYLE OF CAUSE: LUIS FERNANDO BUESO TROCHEZ ET AL. v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: OCTOBER 7, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** SHORE J.

DATED: OCTOBER 8, 2013

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