

Federal Court



Cour fédérale

Date: 20150723

Docket: IMM-2054-14

Citation: 2015 FC 902

Ottawa, Ontario, July 23, 2015

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

HUGO ALBERTO MORAN GUDIEL

Applicant

And

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant Hugo Alberto Moran Gudiel is a citizen of El Salvador, where he worked as a contractor in the construction industry. After receiving threats by a person apparently linked to a criminal organization known as MS 13, he left El Salvador in July 2001. Mr. Gudiel arrived

in Canada almost ten years later, in February 2011, and made a refugee claim on the basis that he feared persecution at the hands of the MS 13 gang and persons related to it.

[1] On March 4, 2014, the Refugee Protection Division [RPD] of the Immigration and Refugee Board rejected Mr. Gudiel's refugee claim on the grounds that adequate state protection was available for him in El Salvador. The RPD also did not find Mr. Gudiel to be credible and determined that he was neither a Convention refugee nor a person in need of protection.

[2] This is an application for judicial review of the RPD's decision. In his application, Mr. Gudiel contends that the RPD erred in three respects: the RPD did not conduct the appropriate risk analysis under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], the RPD did not carry out the required state protection analysis as it failed to determine whether adequate state protection was actually provided to Mr. Gudiel, and the RPD ignored or failed to consider clear and convincing evidence rebutting the presumption of state protection in El Salvador.

[3] For the reasons that follow, Mr. Gudiel's application for judicial review is dismissed. I am not convinced that the RPD's decision was unreasonable, whether in respect of the analyses it conducted or regarding its assessment of the evidence on state protection. I also find that the reasons for the decision adequately explain how the RPD concluded that El Salvador effectively offered adequate state protection to Mr. Gudiel.

[4] There are three issues to be determined:

1. Did the RPD conduct the appropriate risk analysis under section 97 of the *IRPA*?
2. Did the RPD err in applying the test for state protection analysis?
3. Did the RPD err in its consideration of the evidence on state protection?

II. **Background**

[5] In 2000, Mr. Gudiel was hired to do some construction work on a property in El Salvador. Unbeknownst to him, the property belonged to a man known as Cinco de Lena, a leader of an organized crime group working closely with the MS 13 gang. Further to issues relating to the payment for Mr. Gudiel's work, Mr. Cinco de Lena threatened him with death. Mr. Gudiel did not seek assistance from the local police at the time but, fearing he would be killed by Mr. Cinco de Lena or the MS 13, he left El Salvador in July 2001.

[6] Over the following years, he travelled through Mexico, was deported to Guatemala three times and lived in the United States. On various occasions, he learned that the MS 13 gang was apparently looking for him and that Mr. Cinco de Lena continued to harass members of his family. Mr. Gudiel arrived in Canada on February 9, 2011, and made his refugee claim.

A. ***The RPD's decision***

[7] In its decision, the RPD assessed Mr. Gudiel's claim under section 97 of the *IRPA* as he did not have a nexus to a ground under the Convention definition.

[8] The RPD did not find Mr. Gudiel to be credible as it identified discrepancies in his evidence and Mr. Gudiel was not able to provide a satisfactory explanation for them. The RPD determined that there were contradictions in his recollection of events involving Mr. Cinco de Lena and his family, and concluded that Mr. Gudiel had attempted to add details to his story in order to bolster his refugee claim.

[9] The RPD found it speculative that the MS 13 gang wanted Mr. Gudiel's son to work for them due to his problems with Mr. Cinco de Lena, and disbelieved this claim. Noting that, over a period of twelve years, his family members had been leaving El Salvador for the United States, and given the credibility issues, the RPD did not believe that the troubles apparently suffered by Mr. Gudiel's siblings and children were related to Mr. Gudiel's alleged issues with Mr. Cinco de Lena. However, due to Mr. Gudiel's lack of formal education and his emotional and mental challenges outlined in the psychological assessment in evidence, the RPD did not draw a negative inference regarding any of the alleged facts that were marred with discrepancies with respect to dates and specific spatial contexts in Mr. Gudiel's story.

[10] The RPD found that despite the credibility concerns, the determinative issue was state protection. The RPD outlined the principles regarding state protection and reviewed the documentary evidence on El Salvador at length, acknowledging that there were inconsistencies in the totality of the documentary evidence. The RPD was not persuaded that the state authorities in El Salvador were not taking action against the MS 13 and other criminal gangs. The RPD found that the authorities were making serious efforts to contain the criminality, particularly those perpetrated by the MS 13 gang, and were achieving results. The RPD further found that

Mr. Gudiel's evidence about the deficient protection from the police was anecdotal, that his own evidence and his own experiences rather suggested a positive response from the El Salvador police to his complaints, and that the police were willing to investigate. The RPD therefore concluded that Mr. Gudiel's evidence did not show that the police would not provide him adequate state protection in his particular situation and circumstances.

[11] The RPD noted that the refugee definition was forward-looking and suggested that Mr. Gudiel might be unaware of the El Salvador government's recent efforts in combating and containing gang-related criminality, given that Mr. Gudiel had left El Salvador twelve years ago. The RPD therefore determined that Mr. Gudiel's claim under section 97 of the *IRPA* had failed and rejected it.

B. *The standard of review*

[12] Counsel for Mr. Gudiel argued at the oral hearing that, in this application, the standard of correctness should apply to the interpretation and application of the *IRPA* by the RPD and to the RPD's state protection analysis as the issues raised are questions of legal interpretation.

[13] I do not agree. Questions of law are presumptively reviewable on a standard of reasonableness where a tribunal interprets "its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54 [*Dunsmuir*]). The existence of the presumption has been confirmed many times since *Dunsmuir* (*Canadian Artists' Representation v National Gallery of Canada*, 2014 SCC 42;

McLean v British Columbia (Securities Commission), 2013 SCC 67; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61).

[14] Furthermore, the questions raised in the present case are the interpretation and application of section 97 of the *IRPA* to the facts as well as the RPD's assessment of state protection. These are questions of mixed fact and law. The standard of review for determining whether the RPD erred in applying section 97 or in its state protection analysis has been determined by this Court to be reasonableness (*Meza Varela v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364 at para 12 [*Meza Varela*]; *Moran v Canada (Minister of Citizenship and Immigration)*, 2012 FC 546 at para 23 [*Moran*]; *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at para 22 [*Ruszo*]; *Rusznyak v Canada (Minister of Citizenship and Immigration)*, 2014 FC 255 at para 23; *Carranza Benitez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 457 at para 21 [*Carranza Benitez*]; *Bari v Canada (Minister of Citizenship and Immigration)*, 2014 FC 862 at para 19; *Varon v Canada (Minister of Citizenship and Immigration)*, 2015 FC 356 at para 29).

[15] I acknowledge that some cases have concluded that the standard of review is correctness when the issue is strictly whether the RPD has identified the correct test for state protection (*Varga Bustos v Canada (Minister of Citizenship and Immigration)*, 2014 FC 114 at para 27; *Mora Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 750 at para 25; *Ruszo* at paras 20-22). However, the standard is reasonableness when the issue relates, as it does here, to the RPD's application of the legal test to the facts of the case.

[16] When reviewing a decision on the standard of reasonableness, the analysis is concerned with the existence of justification, transparency and intelligibility within the decision-making process. Findings involving questions of facts or mixed fact and law should not be disturbed provided that the decision “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir* at para 47; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). In conducting a reasonableness review of factual findings, it is not the role of the Court to reweigh the evidence or the relative importance given by the decision-maker to any relevant factor (*Dunsmuir* at para 47; *Kanthisamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at para 99 [*Kanthisamy*]). Under the reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency, and intelligibility, a reviewing court should not substitute its own view of a preferable outcome.

III. Analysis

A. ***Did the RPD conduct the appropriate risk analysis under section 97 of the IRPA?***

[17] Mr. Gudiel contends that the RPD did not conduct the appropriate analysis under section 97 of the *IRPA*, which requires an individualized inquiry on the basis of the evidence submitted in the context of present or prospective risk. Mr. Gudiel affirms that the personalized risk he alleged was evidenced by his personal interaction with the agents of persecution and the reprisal faced by his family members. Mr. Gudiel further argues that no subjective fear of persecution is required under section 97 and that the RPD had to determine whether his removal would subject him personally to the dangers and risks stipulated in that provision of the *IRPA* (*Sanchez v*

Canada (Minister of Citizenship and Immigration), 2007 FCA 99 at para 15; *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210 at paras 28-30 [*Guerrero*]). Mr. Gudiel claims that the RPD failed to determine his particular risk.

[18] I disagree. I rather conclude that the RPD correctly applied the test, effectively considered the particular situation of Mr. Gudiel and looked at whether the protection offered by El Salvador actually worked for him and yielded results. The findings of the RPD in that respect were reasonable and fall within the range of possible, acceptable outcomes flowing from the evidence.

[19] Under section 97 of the *IRPA*, Mr. Gudiel had to demonstrate that a removal to El Salvador would subject him personally to, among other things, a risk to his life or of cruel and unusual treatment or punishment if he is unable to avail himself of the protection of the country. In assessing this risk, the RPD is required to make an express determination of what the risk is and clearly express the basis of that risk (*Guerrero* at para 28). However, the RPD does not have to specifically mention that a given individual is at no greater risk than other individuals in that country if the issue does not arise under subparagraph 97(1) (b)(ii) of the *IRPA*.

[20] In the present case, I am satisfied that the RPD stated and looked at the individualized risk faced by Mr. Gudiel on the basis of the evidence relating to him. This is not a situation where the decision-maker failed to state the risk, used vague language to describe it or conflated individual reasons for heightened risk with a generalized risk faced by a larger group. I do not see anything to indicate that the RPD did not reasonably set out and apply the test under section

97. The RPD clearly identified Mr. Gudiel's risk in the second paragraph of the decision, noting that he feared returning to El Salvador due to the perceived threats from Mr. Cinco de Lena, the MS 13 gang and other individuals relating to it. Throughout the decision, the RPD referred to the particular situation and circumstances of Mr. Gudiel in the context of his individualized fears. In addition, the RPD mentioned the incidents of contact between Mr. Gudiel and his family and the police in El Salvador. The conclusions of the RPD in this respect were reasonable.

B. *Did the RPD err in applying the test for the state protection analysis?*

[21] Mr. Gudiel further contends that the RPD erred in its state protection analysis, as it based its conclusion of adequate state protection on its finding that the government of El Salvador had made initiatives to deal with gang violence. At paragraph 26 of its decision, the RPD stated that “[w]hile the effectiveness of the protection is a relevant consideration, the preponderance of recent Federal Court decisions has held that the test for a finding of state protection is whether the protection is adequate, rather than effective per se.” Mr. Gudiel affirms that, by doing so, the RPD used and applied the wrong test as it failed to determine whether adequate state protection was *actually* provided in El Salvador.

[22] I disagree. Instead, I conclude that, when the decision is read as a whole, the RPD correctly applied the state protection test, considered the particular situation of Mr. Gudiel and looked at whether the protection offered by El Salvador actually worked and yielded concrete results. I find that the approach of the RPD was reasonable and that it committed no reviewable error in conducting its state protection analysis.

[23] It is settled law that courts in Canada must presume that state protection is available in the country of origin. The onus always lies on the applicant to rebut the presumption with “clear and convincing proof of a state’s inability to protect” (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at paras 724-726 [*Ward*]). As pointed out by Mr. Gudiel, the state protection test focuses not only on the efforts of the state but also on actual results. This has been expressed in terms of the adequacy of state protection: “[i]t is what state protection is actually provided at the present time that is relevant” (*Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 at paras 5-6). Several cases have indeed affirmed that the proper test for state protection goes beyond the existence of mere serious efforts and requires adequate measures in terms of what is actually accomplished by the state (*Cervenakova v Canada (Citizenship and Immigration)*, 2012 FC 525 at para 74; *Ruszo* at paras 27-28; *Lakatos v Canada (Minister of Citizenship and Immigration)*, 2014 FC 785 at para 30; *Lopez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1176 at para 11; *Ferko v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1284 at para 55 [*Ferko*]; *Meza Varela* at para 16).

[24] I pause to note that counsel for Mr. Gudiel appears to try to distinguish between what is “adequate” protection and what is protection “effective at an operational level”. There is indeed a line of jurisprudence from this Court suggesting that “adequate” may be different from “effective”; however, these cases do not dispute that the protection needs to yield actual results (*Kaleja v Canada (Minister of Citizenship & Immigration)*, 2011 FC 668 at para 25; *Lakatos v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1070 at para 14). A protection that is adequate is a protection that works at the operational level. Adequacy of state protection has been held to mean that the RPD has to consider the state’s capacity to implement measures at

the operational or practical level for the persons concerned (*Meza Varela* at para 16; *Juhasz v Canada (Citizenship and Immigration)*, 2015 FC 300 at para 44).

[25] In the present case, there is no merit to the argument that the RPD erred or failed to do that. On the contrary, the RPD in fact concluded that state protection in El Salvador was adequate and effectively worked. In his submissions, Mr. Gudiel tries to use case law and selected passages from the RPD's reasons to support the argument that an incorrect test was applied. But the Court must consider the reasons as a whole. Based on its detailed review of two information requests, the RPD mentioned the intents and efforts made by the authorities in El Salvador but also considered how the country currently provided adequate state protection to its citizens and how the police were both willing and able to effectively protect them.

[26] The RPD's decision did not only refer to the new anti-gang legislation considered by El Salvador, to its enactment and to its implementation in the country. It also discussed the actual results of this legislation, described concrete examples as to how the government deployed military forces to assist police in combating gang violence, and summarized actions taken on that front. As was the case in *Carranza Benitez* at para 19, the RPD looked at evidence showing how protection was adequate at the operational level in El Salvador.

[27] The RPD further referred to the particular situation of Mr. Gudiel. The RPD reviewed instances where Mr. Gudiel and his son complained to the local police and how the police provided a positive response and assistance to investigate the incidents. The evidence on the record with respect to the police reports indicated that they reacted to the complaints and told

Mr. Gudiel how to get police protection and file denunciations. It was reasonably open to the RPD to conclude that these were not reflective of a lack of state protection.

[28] Just like in *Moran* at para 46, the RPD reasonably found that the evidence was showing “efforts to combat gang criminality that are operationally adequate”. In other words, the RPD considered the evidence on actual implementation and concluded that state protection was available, adequate and effective at an operational level in El Salvador.

[29] The theory behind the concept of the availability of state protection is that international refugee protection should only come into play when the claimant’s own country is unavailable to provide protection (*Ward* at para 709). It is the claimant’s responsibility to rebut the presumption of state protection by providing clear and convincing confirmation that a state is unable to protect its citizens. This analysis must be forward-looking and requires to consider whether the state will provide protection if the claimant returned to his home country (*Srichandradas v Canada (Minister of Citizenship and Immigration)*, 2003 FC 829 at para 4).

[30] The test does not require perfect state protection, but adequate protection. Adequacy of state protection means that it must be effective to a certain degree (*Ferko* at para 44).

[31] In this case, the RPD clearly applied this operational adequacy test. Mr. Gudiel’s disagreement with the conclusion reached by the RPD does not mean that the RPD erred in this respect. There was documentary evidence to support the RPD’s conclusions, the analysis was detailed and covered several pages, and there was sufficient basis for its conclusion on the

adequacy and actual availability of state protection. I therefore find that the RPD's state protection analysis was thorough, well-reasoned and reasonable.

C. *Did the RPD err in its consideration of the evidence on state protection?*

[32] Mr. Gudiel finally submits that the RPD ignored or failed to consider clear and convincing evidence rebutting the presumption of state protection, including documentation he filed showing that despite the introduction of anti-gang legislation, the government has not been able to protect its citizens and police protection was limited due to corruption. Mr. Gudiel contends that the RPD did not articulate the basis as to why it preferred some documentary evidence of attempts at legislative reform against gang violence and police corruption and ignored evidence showing a failure of protection.

[33] I disagree with this reading of the decision. I find instead that the RPD adequately referred to several documents in its analysis and that its conclusions fall within the range of possible, reasonable outcomes in light of the evidence on the record. I acknowledge that Mr. Gudiel referred to other documents that appear to contrast with the RPD's findings and arrive at different conclusions on the status of state protection in El Salvador. He mentions in particular a United States Department of State Report and a document entitled "No Place to Hide".

[34] However, I note that the reports specifically relied on by the RPD in its decision were more recent than most reports and articles singled out by Mr. Gudiel, many of which discussed the state of affairs predating the enactment of the anti-gang legislation in El Salvador. Furthermore, the RPD recognized the existence of sources indicating that El Salvador was one of

the most dangerous countries in the world and specifically acknowledged that the documentary evidence was mixed. But after reviewing some of the evidence in detail, and based on the totality of the evidence before it, the RPD made the following findings regarding the state protection issue:

- There were inconsistencies in the totality of the documentary evidence submitted;
- The RPD was not persuaded that the state authorities in El Salvador were not taking action against the MS 13, M 18 and other gangs;
- The authorities were making serious efforts to contain the criminality and were obtaining results;
- Mr. Gudiel's evidence that he would not be protected by the police in El Salvador was anecdotal;
- The evidence available regarding the specific instances where Mr. Gudiel or his family had made complaints to the police indicated that the authorities offered a positive response. The police did not ignore or dismiss the complaints. Instead, the police did react and investigate;
- Mr. Gudiel may be unaware of the government's measures to combat and contain gang-related criminality in El Salvador over the years, since he left the country some twelve years ago.

[35] Mr. Gudiel is in fact inviting this Court to reweigh the evidence in his favour. In conducting a reasonableness review of factual findings, it is not the role of the Court to do so or to reassess the relative importance given by the decision-maker to any relevant piece of evidence (*Kanthasamy* at para 99). If the finding is reasonable, a reviewing court should not substitute its own view of a preferable outcome.

[36] State protection analyses are typically difficult to conduct, given the significant volume of documentary evidence, often conflicting, that the RPD has before it. This is why it is important to recognize that, in a reasonableness review, deference should be given to the RPD in making this difficult finding.

[37] Mr. Gudiel complains that the RPD did not adequately explain why it preferred the documentary evidence that supported its conclusion over the evidence that differed from it. He refers to decisions where the Court found that a blanket statement that the decision-maker has considered all the evidence will not suffice when the evidence omitted appears to squarely contradict the agency's finding of fact (*Cepeda-Gutierrez v. Canada (Minister of Citizenship & Immigration)* (1998), 157 FTR 35 (Fed. TD) at para 17 [*Cepeda-Gutierrez*]). This Court has also found it to be an error where the RPD acknowledges contrary evidence without truly addressing the reasons why it considers it to be irrelevant, or how this evidence was weighed against an applicant's evidence that the actual requests for help from the state were not fruitful (*Bautista v Canada (Minister of Citizenship and Immigration)*, 2010 FC 126 at para 11).

[38] However, a decision-maker is presumed to have considered all the evidence. The fact that some of the documentary evidence is not mentioned in the reasons of a decision is not fatal (*Hassan v Canada (Minister of Citizenship and Immigration)*, [1992] FCJ No 946 (FCA) at para 3). In addition, the *Cepeda-Gutierrez* case refers to situations where there was material evidence squarely contradicting the conclusions of the decision-maker; this is not the case here. Furthermore, a failure to mention certain pieces of evidence, even contradictory ones, does not necessarily mean that it was ignored by the RPD, that it was unreasonable for the RPD to be

silent on these documents or that this amounted to a reviewable error. In the *Carranza Benitez* decision discussing state protection in El Salvador, the Court concluded, at para 24, that the RPD was not unreasonable in failing to mention certain pieces of documentary evidence which did not support its conclusions on state protection and that the decision-maker need not discuss all pieces of documentary evidence.

[39] In the present case, I am not persuaded that the RPD made an unreasonable and selective use of the evidence and simply ignored evidence favourable to Mr. Gudiel (*Sanchez Aguilar v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1054 at para 17). The RPD candidly mentioned the existence of violence in El Salvador but noted the reports on actual measures taken by the government and the specific instances of police protection being available to Mr. Gudiel. The RPD looked at the actions taken by the police for Mr. Gudiel and his family following the complaints they made and concluded that Mr. Gudiel had not rebutted the presumption of adequate state protection with clear and convincing evidence (*Moran* at para 54). There was nothing unreasonable about this finding.

[40] I am therefore satisfied that the RPD's treatment of the evidence was reasonable and that its factual findings are not based on arbitrariness or irrationality.

IV. Conclusion

[41] For the reasons set forth above, this application for judicial review is dismissed. The RPD's findings and analysis of Mr. Gudiel's risk and on state protection were reasonable. In addition, the RPD provided adequate reasons.

[42] Counsel for Mr. Gudiel had proposed questions for certification in relation to the adequacy of a state's efforts to provide state protection. As I conclude that, in this case, the RPD has in fact conducted an analysis of the actual effectiveness and adequacy of the state's efforts at an operational level, the questions proposed by counsel for Mr. Gudiel would not be dispositive of this case and determinative of the appeal. I therefore decline to certify any questions.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed, without costs;
2. No question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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