Federal Court  Cour fédérale

Date: 20151208

Docket: IMM-1968-15

Citation: 2015 FC 1360

Toronto, Ontario, December 8, 2015

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ANA ADILIA PUERTO RODRIGUEZ and ETHAN GUSTAVO MERINO PUERTO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Protection Division ["RPD"] of the Immigration and Refugee Board dated March 30, 2015, wherein it was determined that the Applicants are neither Convention Refugees nor persons in need of protection pursuant to section 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. For the reasons that follow, this application is allowed.

Background

[2] The principal Applicant, Ana Adilia Puerto Rodriguez, and her son, the minor Applicant, Ethan Gustavo Merino Peurto, are citizens of Honduras. The principal Applicant claims to fear her husband, who she alleges abused her and the minor Applicant. She further alleges that the minor Applicant is at risk from gang violence in Honduras. The Applicants left Honduras on June 16, 2014, stayed in the United States with family for a few months and arrived in Canada on December 20, 2014, making refugee claims upon arrival.

[3] The Minister of Public Safety and Emergency Preparedness [Minister] intervened before the RPD on the inclusion aspects of the claim as well as to canvass whether the exclusion pursuant to Article 1F(b) of the United Nations Convention Relating to the Status of Refugees [the Convention] applied to this claim. Section 98 of IRPA provides that a person referred to in Article 1F(b) of the Convention is excluded from Convention refugee status and status as a person in need of protection. Article 1F(b) relates to a person who has committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee in support of the interpretation of Section 31 advanced, the Applicant places emphasis on the use of the word "which", not being disjunctive and used rather than the word "or", requires the provision to be read as providing only one available means for amending the *Rules*: a petition requiring a resolution to be issued.

RPD Decision

[4] The RPD determined that the Applicant is excluded from refugee protection in Canada pursuant to section 98 of IRPA and found that the minor Applicant was not a Convention refugee or a person in need of protection pursuant to sections 96 and 97 of IRPA. The determinative issues were credibility and whether there were serious reasons for considering that the Applicant had committed a serious non-political crime before coming to Canada.

[5] On the exclusion issue, the RPD found that there were reasonable grounds to determine that the Applicant committed the offence of taking the minor Applicant out of the United States to travel to Canada without the consent of his father. The Applicant acknowledged that she did not have such consent. The RPD found that there were serious grounds for concluding that this would constitute an offence under Canadian criminal law, specifically under sections 282 through 286 of the *Criminal Code of Canada* [Criminal Code].It analyzed the seriousness of the crime based on the stipulated sentencing provisions and the factors outlined in *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*], which include elements of the crime, mode of prosecution, penalty prescribed, facts surrounding the crime and the mitigating and aggravating circumstances underlying the conviction.

[6] In considering mitigating circumstances, the RPD noted that section 285 of the Criminal Code prescribes a defence that would apply if either of the Applicants were escaping from danger of imminent harm. However, while the RPD accepted that the principal Applicant was a victim of abuse and extortion in the past, it found there was insufficient persuasive evidence that

she was escaping a danger of imminent harm when she left Honduras and the United States. The RPD noted that the principal Applicant had not declared to US officials that she feared return to Honduras, that she had not sought asylum in the United States and had delayed coming to Canada, and her failure to cut off communication with her husband while living in the United States. It concluded that section 285 of the Criminal Code was not applicable.

[7] With respect to the inclusion aspect of the minor Applicant's claim, the RPD found that the evidence did not support a conclusion that he had been abused by his father. In relation to the risk of gang violence, the RPD concluded that there was no link between the fear of persecution and one of the Convention grounds such as would be required to support a claim under section 96 of IRPA. In relation to section 97, there was no evidence of personalized risk of harm that was targeted at the minor Applicant by gang members. As any such risk was faced by the general population in Honduras and this risk did not support a positive finding under section 97.

Submissions of the parties

[8] The Applicants argue that Article 1F(b) of the Convention refers to crimes committed outside the country of refuge prior to admission to that country and is therefore inapplicable on the facts of this case, as the alleged criminal act would have occurred only upon entering Canada. The Applicants also submit that the RPD erred by ignoring and failing to mention a Power of Attorney executed by the principal Applicant's husband following the Applicants' arrival in Canada, amounting to ex post facto consent to the principal Applicant taking him from the United States. The RPD's reasons also do not mention that the Minister at the conclusion of the

hearing took the position that the evidence supported a defence to the offence of child abduction and formally withdrew the Article 1F(b) allegation.

[9] The Applicants additionally submit that the RPD's credibility findings are not set out in the required clear and unmistakable terms, given that the RPD finds that the principal Applicant was a victim of abuse and extortion in the past but then goes on to find that she was in no danger of imminent harm, apparently based on her failure to claim asylum in the United States. In considering the minor Applicant's claim, the Applicants submit that the RPD did not consider that his uncle and father are members of the Salva Maratrucha [Maras] gang and that specific threats had been made by this gang against them.

[10] The Respondent argues that the principal Applicant abducted the minor Applicant from another country without the father's permission and deprived the father of possession of his child, and that the Court should not accept the Applicants' argument that no crime had been committed prior to their arrival in Canada. The Respondent also submits that the Power of Attorney does not assist the Applicants, as it was signed after the abduction and could have been signed for numerous reasons. Further, the RPD did not need to mention the Minister's final position on the availability of a defence under section 285, as the RPD is an independent decision maker and can come to its own conclusions on the evidence and issues before it

[11] The Respondent's position is that the RPD's decision was reasonable in finding that the exclusion in Article 1F(d) applied and that the Applicants had failed to establish that they left

Honduras and then the United States because they faced a risk of persecution or a risk faced by the minor Applicant outside the generalized risk faced by others in that country.

Analysis

[12] The argument of the Applicants that resonates with the Court is that the RPD failed to consider the evidence that specific threats had been made by the Maras gang against the minor Applicant. In conducting its analysis of the minor Applicant's risk of harm under section 97 of IRPA, the RPD stated that there was no evidence before it of any personalized risk of harm that was targeted at the minor Applicant by gang members in Honduras. On that basis, it concluded that any gang violence he may face would be a general risk of gang violence that is not personalized but rather faced by the general population in Honduras.

[13] This finding is reviewable on a standard of reasonableness. My conclusion is that it represents a reviewable error by the RPD, in that it failed to consider the principal Applicant's evidence that threats had been directed at both her and the minor Applicant. The principal Applicant's Basis of Claim form refers to her husband's brother, a Maras gang member, as having threated to kill her and her son. The evidence before the RPD also included a document entitled Notarial Attestation, signed by an attorney in Honduras, stating that the principal Applicant met with her on January 10, 2014 to seek assistance with making a complaint about the Maras gang. Specifically, that the Maras gang members had been extorting her at her grocery store business and threatened to kill both her and her son if she did not pay.

[14] The Respondent submits that, as set out in *Bouaouni v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211, a negative credibility finding under section 96 of IRPA will in most circumstances be determinative of a claim under section 97 of IRPA, and the RPD does not need to repeat why it found an applicant's allegations to be not credible under section 96 in order also to reject them under section 97. The difficulty with the Respondent's argument is that the RPD's rejection of the minor Applicant's section 97 claim was not based on adverse credibility determinations. In fact, the RPD had previously stated, in conducting its exclusion analysis, that it accepted that the principal Applicant had been a victim of extortion in the past. Rather, the RPD's rejection of the section 97 claim was based on its incorrect observation that there was no evidence before it of any personalized risk.

[15] The Respondent also argued that the RPD's reasons should be read as a conclusion that there is no forward-looking risk to the minor Applicant, as the grocery store that was the subject of the extortion demands had been closed. With respect, it is not possible to read the RPD's reason this way, as the impugned statement is that "there is no evidence before the panel of any personalized risk of harm that **was** targeted at the minor claimant by gang members in Honduras" (my emphasis). This does not read as a forward-looking conclusion, and the RPD's reasons contain no analysis to the effect that the closure of the grocery store resulted in past risks no longer applying.

[16] The RPD's finding that the minor Applicant did not face any personalized risk of gang violence cannot be characterized as a rejection or discounting of his mother's evidence of the threats that were directed at both of them. While the RPD is not obliged to refer to every piece of

evidence in its reasons, and it is entitled to assess how much weight to assign the evidence, it represents a reviewable error to make a finding based on an erroneous conclusion that there was no evidence on a particular point in issue.

[17] This error requires that this application be allowed with respect to the claim of the minor Applicant. The question therefore arises as to the effect of this error upon the RPD's conclusion that the principal Applicant is excluded under Article 1F(b) of the Convention and section 98 of IRPA. The Respondent argues that there is no relationship between the two issues, as a finding that the RPD erred in connection with the section 97 analysis would not impact its finding that there was insufficient persuasive evidence to conclude that she was escaping a danger of imminent harm when she left Honduras.

[18] My conclusion is that there is a relationship between these issues. As the RPD failed to consider the evidence of threats directed at the minor Applicant, it also failed to consider whether those threats amounted to a danger of imminent harm from which the Applicants were escaping. While those threats may not have resulted in the RPD reaching a different conclusion on the availability of the defence that would have prevented the finding of exclusion, the RPD was required at least to consider that evidence before making that finding.

[19] Also, as submitted by the Applicants, the portion of the RPD's reasons, where it finds the defence in section 285 of the Criminal Code not applicable, is itself somewhat difficult to follow and arguably reaches inconsistent conclusions. The RPD first accepts on a balance of probabilities that the principal Applicant was a victim of abuse and extortion in the past but then

finds, based on its credibility and subjective fear concerns, that there is insufficient evidence to conclude that she was escaping a danger of imminent harm. The Respondent argues that these conclusions can be reconciled by reading the latter conclusion as a finding that, notwithstanding the existence of abuse and extortion, those risks were not motivating the principal Applicant's departure from Honduras and the United States.

[20] In my view, such a reconciliation is intelligible only if the reasons are read as concluding that the abuse and extortion were sufficiently in the past that the fear of these risks was not a motivating factor at the time of the departure. However, the Notarial Attestation, which evidences the principal Applicant seeking assistance in connection with threats from gang members, indicates that she met with the attorney in January of 2014. Similarly, in relation to the abuse by her husband, the affidavit of the principal Applicant's sister, on which the RPD appears to rely in accepting that the principal Applicant had been a victim of abuse in the past, refers to the last violent episode occurring in February 2014. With the Applicants departing from Honduras in June of 2014, I cannot find the Respondent's proposed interpretation sufficiently reconciles the contradictory conclusions so as to make this portion of the RPD's decision reasonable.

[21] It is therefore my decision that this application must be allowed with respect to the claims of both Applicants. The Applicants raised for the Court's consideration a proposed question for certification, being whether Article 1F(b) of the Convention will capture an offence alleged to have been committed upon arrival in Canada. As my decision does not turn on the Applicants' arguments as to the locus of the alleged child abduction offence, no question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter referred back to the RPD for re-determination by a different panel member. No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1968-15
STYLE OF CAUSE:	ANA ADILIA PUERTO RODRIGUEZ and ETHAN GUSTAVO MERINO PUERTO THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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