Federal Court  Cour fédérale

Date: 20170706

Docket: IMM-5243-16

Citation: 2017 FC 659

Toronto, Ontario, July 6, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

JOSIAS CUCHILLA HERNANDEZ, HORACIO NEHEMIA CUCHILLA HERNANDEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants challenge a decision from the Refugee Protection Division [RPD, Board] made on December 7, 2016 [Decision], wherein the RPD, determining that the Applicants were not persons in need of protection, rejected their refugee claims on the basis that they neither satisfied the criteria set out in section 96 nor section 97 of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 [IRPA]. For the reasons explained below, the application cannot succeed.

II. Background

[2] Josias Cuchilla Hernandez, the Principal Applicant, and Horacio Nehemia Cuchilla Hernandez, the Associated Applicant, are brothers and citizens of El Salvador who are seeking refugee protection pursuant to subsection 97(1) of the IRPA.

[3] The Applicants both alleged that they had problems with the Mara Salvatrucha gang [MS-13 or Gang] in El Salvador because gang members tried to recruit them, and when they did not comply, threatened their lives. In December 2012, the Principal Applicant left El Salvador with the help of an agent and arrived in the United States of America [US] where he claimed asylum after being detained. The Associated Applicant left El Salvador and arrived in the US two years later. On August 18, 2016, both Applicants came to Canada and claimed refugee protection, fearing harm at the hands of the Gang for having defied them and fled from El Salvador.

III. Decision under Review

[4] In its Decision, the RPD found that the Applicants had not established a serious possibility of persecution on a Convention ground, or that, on a balance of probabilities, they would personally be subjected to a danger of torture, or face a risk to life or risk of cruel and unusual treatment or punishment upon return to El Salvador. These findings were based on

credibility related to subjective fear (failing to pursue their claim or seek other remedies in the US) for 4 and 2 years, respectively, as well as an Internal Flight Alternative [IFA] in San Salvador or Santa Ana, two cities, both larger than, and several hours away from, Guatajiagua, where they lived, and may have faced an ongoing personalized risk from the Gang.

IV. Issues and Analysis

[5] The Applicants argue that the RPD erred in its credibility and IFA findings. The reasonableness standard of review applies to credibility (*Canada (Citizenship and Immigration) v Khosa*), 2009 SCC 12 at 46 [*Khosa*]) and factual findings made under the IFA test (*Estrada Lugo v Canada (Citizenship and Immigration)*, 2010 FC 170 at paras 30-31). Where the reasonableness standard applies, the role of this Court is neither to reweigh the evidence nor to substitute the decision-maker's reasons with its own view of a preferable outcome (*Khosa* at paras 59, 61).

A. *Credibility*

[6] Credibility decisions of the RPD are given a high level of deference. Here, the RPD found that the Applicants had been at risk of removal during their four and two years sojourns in the US, respectively. During this time, they failed to consult legal counsel or do independent research into possible ways to remain in the US legally, other than speaking to members of their community. The RPD found that such behavior undermined the Applicants' credibility regarding the existence of severe harm or death as encompassed by subsection 97(1).

[7] The Applicants argue that the Board's findings were unreasonable and that the option of claiming status in the US was a fiction, due to very low rates of acceptance for asylum seekers from El Salvador and the fact that the equivalent of IRPA's section 97 – the section upon which they primarily based their claims – does not exist in US asylum law.

[8] I am of the view that the RPD's credibility findings were reasonable, given the lengthy stays in the US, the abandonment of their US asylum claim, and working without status and thus risking deportation at any time. The law is clear that a failure to claim asylum at the first opportunity can be indicative of a lack of subjective fear. The Applicants had ample time to seek legal advice in the US or make an earlier, timely claim in Canada. They chose to do neither (*Llorens Farfan v Canada (Citizenship and Immigration),* 2011 FC 123, paras 14 and 16).

[9] Second, the Applicants' evidence – to the extent that it could be relied upon – showed that some El Salvadoran claimants obtained asylum status in the US. Their opinions and statistics did not constitute sufficient evidence of "no available recourse" vis-a-vis US law or the ability to be granted asylum (*Gomez v Canada (Citizenship and Immigration)*, 2013 FC 1070 at para 19).

B. *Internal Flight Alternative*

[10] After considering the country documentation and the lack of evidence that the Gang is currently looking for the Applicants, including evidence from the Applicants' brother and family, the RPD found that the Applicants could settle in San Salvador or Santa Ana without any personalized risk – other than that faced by the general population due to an admittedly high rate

of crime in El Salvador. Upon reviewing the record, I find that this conclusion was open to the RPD.

[11] The Board set out and applied the two part test in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (FCA) [*Rasaratnam*], namely that:

1. the Board must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted in the proposed IFA; or,
2. conditions in the proposed IFA must be such that it would not be unreasonable, upon consideration of all the circumstances, including consideration of a claimant's personal circumstances, for the claimant to seek refuge there.

[12] However, the Applicants contend that the Board failed to properly apply the test because it did not take into account the fact that state protection would not be available in the two proposed cities, having entirely omitted a state protection analysis. The Applicants point to *Rasaratnam* which states: “the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which if finds an IFA exists” (at para 6). Specifically, the Applicants submit that the RPD made no reference to the high level of impunity for the MS-13 in El Salvador; the fact that it operates in a quasi-governmental capacity; that the police fail to protect its victims throughout the country; and that the judicial system is weak and corrupt. In sum, the Applicants contend that the RPD disregarded the country condition documents, and relied on erroneous evidence. Thus, the Board conducted its IFA assessment without first considering the risk the Applicants faced.

[13] The Respondent counters that the Courts have found that such a finding is necessarily determinative of a refugee claim (*Sarker v Canada (Minister of Citizenship and Immigration)*, 2005 FC 353 at paras 5 and 7) and submits that the RPD's analysis was reasonable. I agree. The Applicants would certainly be correct in their line of reasoning had they provided reliable evidence to show they were still being, or would be, sought by the Gang upon their return. The Board, however, was not persuaded by the evidence presented that the Applicants would be sought by the MS-13 upon their return. Specifically, the RPD noted that the Principal Applicant's testimony was that his brother had not had any problems with the Gang since his return from the US. Given the lack of such risk, coupled with evidence of no current pursuit by the MS-13 of any family members, I agree with the Respondent that it was open to the RPD to conclude that the evidence did not establish that the Gang was currently looking for the Applicants. Indeed, the Applicants, when asked why their brother had not been pursued by MS-13 upon his deportation from the US back to El Salvador, answered that the Gang did not realize he had returned.

[14] Having noted that the Applicants failed to establish that they were being sought by the MS-13, the RPD found the Applicants failed to establish a personalized risk and would face nothing more than the generalized risk faced by all in El Salvador. Thus, the RPD was not required to conduct a full-blown, separate state protection analysis as it found the first branch of the test was met due to a low risk of persecution there. This analysis, in light of the particular circumstances, was entirely open to the Board (*Balogh v Canada (Citizenship and Immigration)*, 2016 FC 426 at para 24).

[15] Finally, the Applicants argued that with respect to both issues 1 and 2 above, the Board overlooked or misconstrued evidence, particularly with respect to (i) a letter from the Applicants' brother that the Gang was still looking for the Applicants, and (ii) the low success rate for asylum claimants in the US.

[16] First of all, I note that a decision-maker is not required to address each issue and every argument raised by the parties. Rather it must "demonstrate that it considered the important points in issue in a given case, and the main relevant factors" (*Santhakumaran v Canada (Citizenship and Immigration*), 2015 FC 1166 at paras 19-20).

[17] Here I find the RPD did address evidence on both claims. The RPD acknowledged that only a small portion of claims from El Salvador are accepted in the US. The RPD also referred to the Applicants' brother's letter, mentioning that he was deported from the US back to El Salvador, and that he is allegedly in hiding. Moreover, the RPD referred to objective country documentation, acknowledging that gangs in El Salvador operate throughout the country and have an elaborate communication network.

[18] Ultimately, the Board found neither of these elements to be persuasive given the totality of the Applicants' evidence, including the failure to take steps to address their status while in the US, and the lack of evidence of any pursuit against them in El Salvador.

V. Conclusion

[19] In light of the above, I am of the view that the RPD's Decision is reasonable in that it bears the qualities of justification, transparency and intelligibility, and falls "within a range of possible, acceptable outcomes which are defensible with respect of the facts and law" presented both before the Board and this Court (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). The burden was on the Applicants to demonstrate that the Board made an unreasonable error and they failed to do so. Accordingly, this application for judicial review is dismissed. No questions were raised for certification.

JUDGMENT in IMM-5243-16

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There are no questions for certification, nor do any arise.

3. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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