Federal Court  Cour fédérale

Date: 20211102

Docket: IMM-2086-19

Citation: 2021 FC 1170

Toronto, Ontario, November 2, 2021

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

OSCAR NOE PALMA LOPEZ
MARIA ARELI VALENCIA ACOSTA
NOE DARIO PALMA VALENCIA
(BY HIS LITIGATION GUARDIAN:
OSCAR NOE PALMA LOPEZ)

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 of Canada, which denied the Applicants' refugee claims as Convention refugees or persons in need of protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RPD found that the Applicants had failed to demonstrate a nexus with a Convention refugee

ground under section 96 of the IRPA and that they had not presented sufficient credible and trustworthy evidence to establish a personalized risk to their life or a risk of cruel and unusual treatment or punishment under subsection 97(1) of the IRPA.

[2] For the reasons that follow, I find that the RPD erred in failing to consider whether there was a well-founded fear of persecution under section 96 of the IRPA because of the minor Applicant being in a particular social group that is at risk of forced recruitment by the Maras. Therefore, the matter will be remitted back to the RPD.

I. Background

[3] The Applicants, Oscar Noe Palma Lopez [principal Applicant], his wife, Maria Areli Valencia Acosta [female Applicant] and their minor-aged son, Noe Dario Palma Valencia [minor Applicant], are refugee claimants from El Salvador. On October 4, 2017, the female Applicant's eldest son (and principal Applicant's stepson) was brutally gunned down and killed by members of the El Salvador gang, the Maras, at the age of 19.

[4] Six days after the killing, it is alleged that the female Applicant was threatened by members of the Maras suspected of being involved in the death, and warned not to report the killing to the police. The Applicants filed refugee claims asserting a fear of persecution.

[5] The Applicants obtained American visas in December 2017 and arrived in Canada in March 2018. Based on an exception to the Safe Third Country Agreement, their refugee claims were referred for assessment to the RPD.

[6] In the principal Applicant's interview with border security, he stated that he feared El Salvador and primarily for the life of the minor Applicant. In the Basis of Claim narrative (BOC) he asserted a fear for the Applicants' lives because of the threats made by the Maras and a belief that the Applicants would be in danger if they remained in El Salvador.

[7] On February 22, 2019, the hearing was held before the RPD. At the hearing, it was asserted both through the testimony of the principal Applicant and by the Applicants' counsel that there was a fear that the Maras would target the minor Applicant for recruitment and that the principal Applicant and female Applicant would be at risk for trying to stop it.

[8] The decision denying the claim was rendered orally on February 22, 2019 and a written transcript of the decision issued on March 8, 2019 [Decision].

II. The Decision

[9] With respect to section 96 of the IRPA, the RPD determined that the basis of the Applicants' claim was a fear of a personal vendetta by a criminal organization arising from the eldest son's death and therefore that there was no connection to the Convention refugee definition in section 96. The RPD focussed its assessment on the subsection 97(1) analysis. It considered the argument made by the principal Applicant at the hearing that the minor Applicant was at risk of recruitment by the Maras to be an embellishment of the subsection 97(1) claim.

[10] The RPD acknowledged that the eldest son had suffered a tragic death and that the family, in particular the female Applicant, was traumatized by the event. However, the RPD

found the Applicants' evidence to lack credibility due to a number of inconsistencies between the testimony given before the RPD and the information provided in the BOC.

[11] In particular, the RPD drew adverse inferences from the omission of the following information from the BOC: 1) the fear that the minor Applicant would be recruited by the Maras; 2) a meeting involving the female Applicant and the District Attorney the day after the female Applicant was threatened and warned by the Maras; and 3) a claim that the female Applicant shouted and criticized the Maras during their interaction. The RPD also drew an adverse inference from the Applicants' delay in leaving El Salvador and found the explanation given for the delay to be inconsistent between the testimony and the BOC. The RPD further highlighted the Applicants failure to advance evidence that the Maras had been seeking them out in their home after the October 10, 2019 encounter, or of any attempts to seek protection.

[12] The RPD concluded that the Applicants had provided insufficient credible and trustworthy evidence that the risk of persecution was personalized either to the minor Applicant or to themselves as a family.

III. Amendment to the Style of Cause

[13] As a preliminary matter, the Applicants requested an amendment to the style of cause to correct the names of the female Applicant and the minor Applicant. These changes were not contested by the Respondent and the Court granted the request for amendment at the hearing.

IV. Issues and Standard of Review

[14] The following issues are raised by this application:

1) Was it reasonable for the RPD to conclude there was no nexus to a Convention refugee ground under section 96 of the IRPA?

2) Did the RPD err in its assessment of the Applicants' credibility and in concluding that there was no credible and trustworthy evidence of personalized risk?

[15] The applicable standard of review for the Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 25).

[16] In exercising the standard, the Court must determine whether the decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at paras 83, 85-86, and 99; *Canada Post Corp* v *Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at paras 2, 31). A reasonable decision bears the hallmarks of justification, transparency, and intelligibility (*Vavilov* at para 99).

V. Analysis

A. *Was it reasonable for the RPD to conclude that there was no nexus to a Convention refugee ground under section 96 of the IRPA?*

[17] The Applicants assert that the RPD erred in failing to consider the fear of forced recruitment of the minor Applicant by the Maras under section 96 of the IRPA. The Applicants contend that evidence of the risk of forced recruitment of the minor Applicant, and its connection to Convention grounds, was before the RPD in the National Documentation Package for El Salvador and the document from the United Nations High Commissioner for Refugees, dated March 2016, entitled "Eligibility Guidelines for Assessing the International Protection Needs of

Asylum-Seekers from El Salvador" [UNHCR Document]. However, this evidence was not considered for the purpose of section 96 of the IRPA in the Decision.

[18] The Respondent asserts that the Decision on section 96 of the IRPA was reasonable as it was based on the RPD's characterization of the claim as being focussed on personalized fear from a vendetta arising from the eldest son's death. The Respondent contends that this characterization was consistent with the manner in which the claim was presented in the BOC and the way the evidence was argued before the RPD.

[19] As confirmed by the Supreme Court of Canada in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*] at pages 745-746, the RPD must consider all grounds for making a claim for refugee status that are raised by the evidence, even if the grounds have not been identified by a claimant. It is not the duty of a claimant to identify the reasons for their persecution (see also *Mbo Wato v Canada (Citizenship and Immigration)*, 2012 FC 1113 [*Mbo Wato*] at para 16; *Viafara v Canada (Citizenship and Immigration)*, 2006 FC 1526 [*Viafara*] at paras 6-8).

[20] In this case, as acknowledged by the RPD, it was raised at the hearing that the principal Applicant had a fear that the Maras would be targeting the minor Applicant because of his age and that the principal Applicant and female Applicant would resist this, putting the whole family in danger.

[21] Further, the RPD had the UNHCR Document before it. The UNHCR Document discusses, at page 36, the recruitment of youth by gangs, and the consideration of associated Convention grounds:

> Recruitment by gangs of local children and youth – particularly boys but sometimes also girls – reportedly starts from an early age. ... The refusal to join a gang or to collaborate with its members by a child or youth and/or their family is reportedly usually interpreted as a challenge to the gang's authority or as a ground for suspicion of some rival affiliation, resulting in threats and violence directed against the child or youth and/or their family members. Even if the child leaves the area where the gang operates, family members who remain there reportedly may continue to face threats and violence.
>
> Depending on the particular circumstances of the case, UNHCR consider that children, in particular but not limited to those from areas where gangs operate or from social milieus where violence against children is practised, may be in need of international refugee protection on the basis of their membership of a particular social group or on the basis of their (imputed) political opinion or on the basis of other Convention grounds.
>
> [Footnotes omitted]

[22] The UNHCR Document also discusses, at page 42, the international protection that may be needed for family members associated with individuals at risk of forced recruitment:

> Family members, dependants, other members of the households, and employees of individuals with any of the profiles above may also be in need of international protection for reason of their association with individuals at risk on the basis of their (imputed) political opinion, or on the basis of their membership of a particular social group, or other Convention grounds.
>
> [Footnote omitted]

[23] The RPD acknowledges that there is "a risk that Maras will seek to have teenagers join them in El-Salvador in the present day". However, the risk of forced recruitment of the minor Applicant was not considered under section 96 of the IRPA. The RPD engaged with the issue of

forced recruitment only for the purpose of considering whether there was evidence to establish personalized risk under subsection 97(1) of the IRPA. In my view, this was not reasonable.

[24] Where the evidence is sufficient to establish a well-founded fear of forced recruitment based on age, this can constitute a nexus with the Convention refugee grounds under section 96 of the IRPA (*Ismail v Canada (Citizenship and Immigration)*, 2016 FC 650; *Al Bardan v Canada (Citizenship and Immigration)*, 2020 FC 733 [*Al Bardan*]; *Tobias Gomez v Canada (Citizenship and Immigration)*, 2011 FC 1093 at para 29).

[25] There was an obligation on the RPD to consider the evidence and the full record before it in exercising its duty to decide whether the Convention definition was met (*Viafara* at paras 6-9; *Ward* at pages 745-746). Even if the Applicant did not argue the issue of forced recruitment in the context of section 96 of the IRPA, both section 96 and subsection 97(1) of the IRPA were before the RPD, and there was evidence before the RPD from the UNHCR Document linking the risk of forced recruitment to consideration of Convention grounds. In my view, it was not reasonable to ignore this pertinent evidence relating to whether the Convention definition was met because it was not introduced in argument under section 96 of the IRPA.

[26] The RPD found that the Applicants had not presented any evidence that the Maras had sought out the family or the minor Applicant before the family departed from El Salvador; however, this does not address the forward risk to the minor Applicant who is now over the age of 12. The absence of past persecution does not remove the requirement to examine forward-looking risk (*Al Bardan* at para 26).

[27] Further, it was not reasonable to ignore this ground because the assertion was not in the BOC. While the RPD may have had credibility concerns relating to the reason for the omission of this evidence from the BOC, the RPD has an obligation to consider objective risk grounds, such as the age of the minor Applicant, that are apparent on the record even if an applicant is considered not to be credible in testimony (*Jama v. Canada (Citizenship and Immigration)*, 2014 FC 668 at para 20; *Mbo Wato* at paras 15-16).

[28] In this case, the RPD failed to consider all of the objective risk grounds for section 96 of the IRPA that were apparent from the evidence and as such, the Decision as it relates to section 96 lacks proper foundation and was not reasonable.

B. *Did the RPD err in assessing the Applicants' credibility and concluding that there was no credible and trustworthy evidence of personalized risk?*

[29] As recently summarized in *Liang v Canada (Citizenship and Immigration*), 2020 FC 720 at paragraphs 12 and 13:

> [12] Credibility findings by the RPD demand a high level of judicial deference and should only be overturned in the clearest of cases (*Khan v Canada (Citizenship and Immigration)*, 2011 FC 1330 at para 30). Credibility determinations have been described as "the heartland of the Board's jurisdiction", given that they are essentially pure findings of fact which are reviewable on a reasonableness standard (*Zhou v Canada (Citizenship and Immigration)*, 2013 FC 619 at para 26; and *Cetinkaya v Canada (Citizenship and Immigration)*, 2012 FC 8 at para 17).
>
> [13] Under the *Vavilov* framework, the Court must respect and cannot interfere with a credibility assessment unless it is satisfied that the reasons of the RPD are not "justified, intelligible and transparent" which is assessed "not in the abstract" but from the point of view of the "individuals subject to" the decision (*Vavilov* at para 95). It is important for the reviewing court to ensure that an administrative decision maker has not abdicated its duty to "justify to the affected party, in a manner that is transparent and

> intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96). For the Applicant to succeed in the present matter, she must satisfy the Court that there are "sufficiently serious shortcomings in the decision" (*Vavilov* at para 100).

[30] The Applicants argue that the RPD failed to consider the psychologist's report on the female Applicant and in particular, the assessment of the female Applicant's emotional state when considering the omissions and inconsistencies in evidence. The Applicants also argue that unreasonable assumptions were made relating to perceived assistance that the Applicants received while sojourning at Vive La Casa in the USA before arriving in Canada. They further assert that the RPD unreasonably assessed the Applicants' financial situation and the reasons given for their delay in leaving El Salvador.

[31] The Respondent contends that it was reasonable for the RPD to conclude that there was insufficient credible evidence of personalized risk in view of the significant inconsistencies and gaps in the Applicants' evidence. The Respondent argues that the Applicants have not engaged with the key insufficiencies and inconsistencies noted by the RPD in the Decision. I agree.

[32] As noted by the RPD, the omissions in the BOC as to the fear of recruitment of the minor Applicant, the October 11, 2019 meeting at the District Attorney's Office and the female Applicant's altercation with the Maras on October 10, 2019, are significant as they go to the heart of the claim. The RPD considered the Applicants' explanations for these omissions and inconsistencies and rejected them. I am unable to find a reviewable error in its analysis.

[33] While the Applicants assert that the RPD did not consider the psychologist's report, this is not an accurate reflection of the Decision. The RPD accepted the comments made in the report that the female Applicant remains affected by the traumatization of her son's violent death. The RPD states only that the letter went too far in its assertion that the female Applicant should leave the country to achieve a full recovery. As noted by the RPD, this seemed to advocate for the refugee claim and was the only part of the report that it gave no weight.

[34] The Applicants' assertion that the psychologist's report should be used as a basis for explaining the omissions and gaps in the evidence relating to the female Applicant is in my view, an attempt to ask this Court to improperly reweigh the evidence. This is not the role of the Court on a judicial review where there are no exceptional circumstances to justify such intervention (*Vavilov* at paras 125, 126; *Canada Post* at para 61).

[35] Further, while I agree with the Applicants that there was an assumption made by the RPD that certain advice may have been given to the Applicants at Vive La Casa in the USA before they arrived in Canada, this does not sufficiently undermine the analysis made by the RPD or overcome the omissions and inconsistencies noted in the evidence.

[36] Similarly, while certain inferences were made in the Decision about the Applicants' financial means to leave the country, I do not consider these inferences to be a significant part of the analysis by the RPD on the issue of delay or its credibility findings as a whole.

[37] In my view, the Applicants have not established that there are any serious shortcomings in the RPD's subsection 97(1) analysis that would constitute a reviewable error. Accordingly, I am unable to conclude that the RPD's finding on subsection 97(1) of the IRPA is unreasonable.

VI. Conclusion

[38] As noted by the RPD, the threshold under section 96 of the IRPA is far lower than under subsection 97(1) of the IRPA. As such, my findings on subsection 97(1) do not interfere with the reviewable error found under section 96.

[39] For the reasons set out above, I find that the RPD failed to fully consider section 96 of the IRPA and whether there was a well-founded fear of persecution because of the minor Applicant being in a particular social group that is at risk of forced recruitment by the Maras. I therefore consider it appropriate to remit the matter back to the RPD to conduct this analysis.

[40] The parties proposed no question for certification and I find that none arises in this case.

JUDGMENT IN IMM-2086-19

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to change the name of the female Applicant to "Maria Areli Valencia Acosta" and the name of the minor Applicant to "Noe Dario Palma Valencia", with immediate effect.

2. The application is granted and the matter is remitted back to the RPD for redetermination in accordance with these reasons.

3. No question of general importance is certified.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2086-19
STYLE OF CAUSE:	OSCAR NOE PALMA LOPEZ, MARIA ARELI VALENCIA ACOSTA, NOE DARIO PALMA VALENCIA (BY HIS LITIGATION GUARDIAN: OSCAR NOE PALMA LOPEZ) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 25, 2021
JUDGMENT AND REASONS:	FURLANETTO J.
DATED:	NOVEMBER 2, 2021

APPEARANCES:

Jack C. Martin	FOR THE APPLICANTS
Nicholas Dodokin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jack C. Martin Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT