Federal Court  Cour fédérale

Date: 20220201

Docket: IMM-305-21

Citation: 2022 FC 114

Toronto, Ontario, February 1, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

Carlos Mauricio LOPEZ RIVAS
Kelly Natalie MEDRANO CRESPIN
Daniel Ernesto VARELA MEDRANO
Adriana Natalie VARELA MEDRANO

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES, AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Principal Applicant, Mr. Lopez Rivas, along with his wife, Ms. Medrano Crespin, and their two minor children, are citizens of El Salvador. The Applicants allege that they fled El Salvador and came to Canada due to their fear of persecution by gang members. In particular, the Applicants fear being extorted, kidnapped or killed should they return to El Salvador.

[2] On multiples times in October 2017, Mr. Lopez Rivas noted being followed by different vehicles when driving home from work. One day, a driver in an unidentified vehicle told him that he knew his family's details, including where they lived, and asked for $2,000.00, informing him that he would later be told where and when to bring the money. No one followed up with Mr. Lopez Rivas to provide him with this information.

[3] Later that same month, Mr. Lopez Rivas' daughter was approached three times by individuals who tried to talk to her, and on the third approach, told her to tell her father to pay the money. There were no further follow-ups.

[4] In March 2018, five months after these incidents, the Applicants left El Salvador.

[5] On February 5, 2020, the Refugee Protection Division [RPD] rejected the Applicants' refugee claims.

[6] The Applicants appealed, and on December 21, 2020, the Refugee Appeal Division of [RAD] of Immigration and Refugee Board of Canada rendered on December 21, 2020 [Decision] confirmed the RPD's decision that the Applicants are neither Convention refugees nor persons in need of protection [Decision].

[7] The Applicants seek judicial review of the Decision and request that it be set aside and that the matter be referred back for re-determination by a different member of the RAD.

[8] The central issue in the present application is whether it was reasonable for the RAD to find that the evidence did not establish that, if the Applicants were to return to El Salvador, they would be more likely than not to be personally subjected to a risk to their lives or a risk of other kinds of serious harm that would make them persons in need of protection.

[9] Credibility is not at issue. The RAD accepted that the Applicants had multiple contacts with unknown gang members. The RAD found, however, that most of the incidents, save for those mentioned in paragraphs 2 and 3 above, were related to risks faced generally by others in or from El Salvador. The RAD found that, while there was some evidence that the two incidents in October 2017 may be linked, there were no specific demands, no payment instructions, and no further follow-ups until the Applicants left El Salvador or even to the present day.

[10] The Applicants submit that the RAD failed to consider the larger context in which those events took place, namely the extremely high levels of crime and violence in El Salvador, and specifically the risks for those who do not pay extortion money. The Applicants further submit that they should not be faulted for not remaining in El Salvador and permitting the risks to materialize. Counsel drew the analogy to a burning house, questioning whether the family had to wait until they got burned or a family member perished before they could leave the house.

[11] The Respondent, relying on *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], submits that the RAD coherently and rationally analyzed the Applicants' evidence and reasonably concluded that the events did not include any specific instructions for payment, nor were there any repercussions or further follow-up from the extortionists in the five

months that followed these events and requests during which the Applicants were still in El Salvador.

[12] The Respondent pleads that the RAD reasonably determined that the Applicants had failed to establish a forward-looking risk on a balance of probabilities, and that now the Applicants are simply seeking to have this Court re-weigh the evidence.

[13] Having reviewed the record and considered the submissions of counsel, I am not persuaded that the Decision is unreasonable.

III. Issue and Standard of Review

[14] The sole issue is whether the Decision was reasonable. In particular, whether it was reasonable for the RAD to find that the Applicants had failed to establish that they would be personally subject to a risk that is not generally faced by other individuals in or from El Salvador.

[15] The parties agree that the standard of review is reasonableness as set out in *Vavilov.* It is the party challenging the decision who bears the burden of demonstrating that it is unreasonable (*Vavilov* at para 100). If "the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and [if] it is justified in relation to the relevant factual and legal constraints that bear on the decision", it is not for the reviewing court to substitute the outcome it would prefer (*Vavilov* at para 99).

[16] A reviewing court should also refrain from reweighing or reassessing the evidence considered by the decision maker and must not, absent exceptional circumstances, interfere with factual findings (*Vavilov* at para 125). Nevertheless, *Vavilov* instructs that a decision maker "must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them" (at para 126).

IV. Analysis

[17] It is common ground between the parties that Justice Gleason in *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678 clearly outlines the analysis required under s. 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27:

> [40] In my view, the essential starting point for the required analysis under section 97 of IRPA is to first appropriately determine the nature of the risk faced by the claimant. This requires an assessment of whether the claimant faces an ongoing or future risk (i.e. whether he or she continues to face a "personalized risk"), what the risk is, whether such risk is one of cruel and unusual treatment or punishment and the basis for the risk. Frequently, in many of the recent decisions interpreting section 97 of IRPA, as noted by Justice Zinn in *Guerrero* at paras 27-28, the "… decision-makers fail to actually state the risk altogether" or "use imprecise language" to describe the risk. Many of the cases where the Board's decisions have been overturned involve determinations by this Court that the Board's characterization of the nature of the risk faced by the claimant was unreasonable and that the Board erred in conflating a highly individual reason for heightened risk faced by a claimant with a general risk of criminality faced by all or many others in the country.
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> [41] The next required step in the analysis under section 97 of IRPA, after the risk has been appropriately characterized, is the comparison of the correctly-described risk faced by the claimant to that faced by a significant group in the country to determine whether the risks are of the same nature and degree. If the risk is not the same, then the claimant will be entitled to protection under section 97 of IRPA. Several of the recent decisions of this Court (in the first of the above-described line of cases) adopt this approach.

[18] Moreover, the parties and the RAD agree on, in the Applicants' words, the "jurisprudential principles". There is no dispute as to whether the RAD relied on the applicable case law.

[19] Where the parties differ is whether the Applicants have established, on a balance of probabilities, that there is an ongoing future risk to them that is more than the generalized criminality present in El Salvador. Put differently, the issue is whether the evidence in the record is sufficient to establish, on a balance of probabilities, that there is such a risk. Consequently, this is a matter that turns on its facts.

[20] In *Garces Canga v. Canada (Citizenship and Immigration)*, 2020 FC 749 [*Garces Canga*], my colleague Justice Gascon recently stated that "for the purposes of section 97, the administrative decision maker must consider whether the removal of the applicant could expose him or her personally to the risks and threats specified in that section. The risk must be individualized and must be established on a balance of probabilities; it is prospective and has no subjective component" (para 49) (Emphasis added).

[21] Taking into account the record before the RAD, I am not persuaded that it was unreasonable for the RAD to find that, on a balance of probabilities, the evidence in the record did not establish a forward looking individualized risk. I agree with the Respondent that ultimately the Applicants are seeking to re-weigh the evidence, which, absent exceptional circumstances, is not the role of this Court on judicial review (*Vavilov* at para 125).

[22] The RAD acknowledged that the incidents described in paragraphs 2 and 3 above might have been connected or might have involved an element of personal targeting, however the RAD found that they would be on "the less serious end of the personal targeting spectrum". The RAD found that the gang members made no specific demands, gave no specific payment instructions, and there was no further follow-ups on the demands. It is the administrative decision maker, in this case the RAD, who has the primary responsibility for making findings of fact, and such findings command deference (*Garces Canga* at para 58).

[23] Turning now to the Applicants' question as to how long did they have to wait or how bad did it have to get before deciding to leave. While I understand the Applicants' concerns given their experiences, it is not my role to answer that question. Provided the RAD's decision was based on an internally coherent and rational chain of analysis that is justified in relation to the facts and the law, which I find it is, I am required under a reasonableness review to defer to the RAD's decision.

V. Conclusion

[24] For these reasons, this application for judicial review is dismissed. Neither party proposes a question of general importance, and none arises.

JUDGMENT in IMM-305-21

THIS COURT'S JUDGMENT is that:

1. The Applicants' application for judicial review is dismissed;

2. There is no question for certification arising.

"Vanessa Rochester"

Judge

FEDERAL COURT

SOLICITORS ON RECORD

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APPEARANCES:

Me Luis Antonio Monroy	FOR THE APPLICANTS
Me Matthew Siddall	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Me Luis Antonio Monroy Solicitor	FOR THE APPLICANTS
Me Matthew Siddall Attorney General of Canada	FOR THE RESPONDENT