

Federal Court



Cour fédérale

Date: 20101210

Docket: IMM-1482-10

Citation: 2010 FC 1271

Ottawa, Ontario, December 10, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

**ELENA YOLANDA DURAN and
FRANCISCO OSWALDO ALVAREZ DURAN**

Applicants

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the written decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 23 March 2010 (Decision), which refused the applications of both Applicants to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Female and Male Applicants, a mother and her adult son, are citizens of El Salvador. The Female Applicant claims that in 1995 her son-in-law was abducted because of his involvement with the Farabundo Marti National Liberation Front (FMLN), a left-wing political party. After his release, he and the Female Applicant's daughter were subjected to threats and other attacks in 1998 and 2001. In 2002, the daughter and son-in-law were granted refugee protection in Canada, at which time the Applicants and another son, Douglas, moved into the daughter's house to finish out her lease.

[3] The Applicants allege that, in April 2003, men invaded that house, seeking the whereabouts of the daughter. The Female Applicant said that they threatened her when she refused to co-operate with them. She also stated that, based on the way they spoke, their violence and their height and haircuts, she knew that they were police officers.

[4] In May 2003, two men shot the Female Applicant but she escaped serious injury. The Applicants stated at the hearing that they believe the shooting to be related to the daughter and son-in-law's situation. Shortly after the incident, however, the Female Applicant filed a police report, saying that the shooters did not speak to her, that she did not know why she had been targeted and that the culprits may have been thieves.

[5] The Applicants and Douglas relocated to another city. They experienced no further problems until 2007, when a police contact informed them that the son-in-law's abductors had been released from prison. At that time, the daughter's child was considered at risk and was sent to Canada.

[6] In February 2008, two men struck the Male Applicant in the head with a gun, causing him to seek medical treatment. The family moved houses yet again. In May 2008, Douglas went missing and has not been heard from since. The Applicants, fearing for their own safety, fled the country.

[7] On 9 June 2008, the Female Applicant entered Canada via the United States and immediately made a refugee claim. On 5 August 2008, the Male Applicant entered Canada via Mexico and the United States and also immediately made a refugee claim. The RPD heard both claims together on 1 March 2010; neither Applicant was represented by counsel. The RPD rendered an oral decision on the same day and a written Decision on 23 March 2008. Neither Applicant was granted Convention refugee status under section 96 of the Act or status as a person in need of protection under section 97 of the Act. This is the Decision under review.

DECISION UNDER REVIEW

[8] The RPD's Decision was based on two factors: a negative credibility finding with respect to the Female Applicant; and the failure of both Applicants to establish a nexus between what had

happened to the daughter and son-in-law and what allegedly had happened to them after the daughter and son-in-law emigrated from El Salvador.

[9] The RPD found the Female Applicant's evidence at the hearing to be "vague, confusing and contradictory." The Decision notes that the Female Applicant "rarely" responded to questions directly, which required the RPD to re-ask questions several times.

[10] The RPD did not accept the Female Applicant's statement that the crimes which she and her family had suffered were committed by police officers. For example, there was insufficient evidence to prove that police had executed the home invasion. The perpetrators were not in uniform, they did not identify themselves as police and they did not demonstrate behaviour that would distinguish them as anything other than common criminals.

[11] Also, the Female Applicant's oral evidence regarding the abduction of her son-in-law was contradicted by documentary evidence in the form of a newspaper article, which the Applicant herself said was accurate. Although she asserted that the abduction was politically motivated, the article reported that the motivation was "purely financial." And while she stated that the abductors were police officers, the article identified them as members of a "criminal ring." The RPD reasoned that, since the article included the abductors' names and their photographs, it would likely also have pointed out that they were members of the police force had that been confirmed. The fact that the abductors had been arrested and jailed was seen by the RPD as further proof that they were not police officers and had no connection to the police.

[12] The article also reported that the abductors had been arrested in 1995. The Female Applicant stated that they were released in 2007 which, the RPD concluded, would have made it impossible for them to have been the same people who shot the Female Applicant in 2003.

[13] Finally, at the hearing, the Female Applicant stated that the 2003 shooting was linked to the political situation involving her daughter and son-in-law. This contradicted her statements to police and to immigration officials that she did not know who the culprits were or why she had been targeted.

[14] The RPD found that the Male Applicant's evidence that he was assaulted with a gun also was too weak to establish a link to the daughter and son-in-law; his assertion that there was such a link was mere speculation. The Male Applicant could not identify who the attackers were or why they had attacked him.

[15] Similarly, there was no evidence to support a connection between the disappearance of Douglas and the political troubles of the daughter and son-in-law. No one knows why Douglas disappeared or who, if anyone, was responsible.

[16] Ultimately, the RPD found that, contrary to their claims, the Applicants were not victims of a political, police-related conspiracy but rather were "victims of a series of violent attacks that [were] ... not connected to ... other family members." There was insufficient evidence to establish a nexus between the daughter and son-in-law's political troubles and the events described by the

Applicants. With respect to the other Convention grounds, they did not fear anyone in El Salvador on the basis of their nationality, race or religion, and their status as victims of crime alone could not form the basis of their membership in a particular social group. Although the family does qualify as a social group, it cannot apply in the absence of a nexus.

[17] Having dealt with the section 96 claims, the RPD addressed the section 97 claims. It found, based on the documentary evidence and past jurisprudence, that the Applicants did not face a personalized risk in El Salvador. In that country murder is, by some standards, an epidemic. Extortions, theft and abduction are pervasive. These are generalized risks faced by everyone in El Salvador. Because the Applicants did not satisfy their burden of adducing sufficient evidence to establish a claim under either section of the Act, their claims were rejected.

ISSUES

[18] The Applicants raise the following issues:

1. Whether the RPD erred in its credibility findings;
2. Whether the RPD misinterpreted or ignored significant evidence;
3. Whether the RPD based its Decision on conclusions that were unsupported by the evidence.

STATUTORY PROVISIONS

[19] The following provisions of the Act are relevant to this application:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality,

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a

their country of former habitual residence, would subject them personally

pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons

(2) A également qualité de personne à protéger la

prescribed by the regulations as being in need of protection is also a person in need of protection.

personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

STANDARD OF REVIEW

[20] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[21] The RPD's decision is based, in part, on its assessment of the Applicants' credibility. The determination of credibility is within the RPD's expertise. For this reason, credibility findings attract a standard of reasonableness on review. See *Aguirre v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 571, [2008] F.C.J. No. 732 at paragraph 14.

[22] The Applicants have also brought an issue before the Court concerning the RPD's treatment of the evidence. In considering whether the RPD ignored material evidence, misunderstood the evidence or considered irrelevant evidence, the appropriate standard is reasonableness. See *Dunsmuir*, above, at paragraphs 51 and 53.

[23] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” See *Dunsmuir*, above, at paragraph 47. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

ARGUMENTS

The Applicant

Credibility Findings Failed to Consider Psychological Frailty

[24] The Applicants argue that the RPD’s credibility assessment of the Female Applicant failed to take into account her psychological and emotional problems, as set out in the February 2010 counseling assessment of Fanny Oliphant, a family counselor with the Calgary Immigrant Women’s Association. Ms. Oliphant met with the Female Applicant 16 times and reported, *inter alia*, the following symptoms of psychological distress: confusion, emotional distress, high levels of anxiety, memory difficulties, sleep difficulties and possible Post Traumatic Stress. Not only did the RPD fail to take the counseling assessment into account, it failed even to address it.

[25] The RPD also failed to consider that neither of the Applicants was represented by counsel at the hearing and that the Female Applicant, in particular, had difficulty presenting her case due to her psychological frailty.

Evidence Supports a Finding of Nexus

[26] The Applicants argue that the nexus between the political persecution suffered by the Female Applicant's daughter and son-in-law and the violence suffered by the Applicants is obvious, based on the evidence. Family members were previously attacked; it stands to reason that this is directly related to the present attacks. The RPD's finding that the present attacks represent nothing more than "random acts of crime" is, in the Applicants' view, illogical, preposterous and indicative of the RPD's deficient assessment of the documentary evidence.

[27] The persecution that they have endured due to their family connection to the daughter and son-in-law clearly locates the Applicants' claims within the category of "membership within a particular social group" under section 97. The RPD erred in failing to find such a nexus.

The Respondent

Credibility Findings Are Reasonable and Deserving of Deference

[28] The RPD's determinations regarding credibility are deserving of deference. As Justice Simon Noël observed in *Ankrah v. Canada (Minister of Employment and Immigration)*, [1993]

F.C.J. No. 385 (T.D.) at paragraph 7: “This Court must be most careful not to substitute its decision for that of the Tribunal, especially where the decision is based on an assessment of credibility.”

[29] The RPD’s credibility findings with respect to the Female Applicant are reasonable in light of her vague and confusing responses and the number of contradictions between her oral evidence at the hearing and the documentary evidence, namely the police report on the shooting incident, the newspaper article and the record of her interview with immigration officials.

Court Should Not Re-weigh the Evidence

[30] The Respondent argues that the Applicants simply disagree with the RPD’s findings of fact and its interpretation of the evidence. However, the RPD is an expert panel charged with determining precisely the kind of questions that were determined in this case. It is not the role of this Court to re-weigh the evidence. See *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paragraphs 4, 46, 59, 61; *Dunsmuir*, above, at paragraphs 47-49.

[31] Nexus is a required element that must be proven in every refugee claim. It is the applicant’s burden to prove that there is a link between his or her claim and one of the five Convention grounds enumerated in section 96. See *Rizkallah v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 412 (F.C.A.). In the instant case, the Applicants failed to adduce sufficient evidence to establish that link.

[32] With respect to the section 97 analysis, the RPD carefully considered the country conditions in El Salvador with specific focus on the pervasiveness of criminal organizations and the severe violence that such organizations mete out to the citizenry. It was reasonable for the RPD to find that the risk that the Applicants face is not a personalized risk but the same generalized risk faced by their fellow citizens. For this reason they are not entitled to protection under section 97.

ANALYSIS

[33] The Applicants' grounds for reviewable error are contained in their written submissions and counsel's oral presentation at the hearing of this matter. Some of them suggest that the Applicants simply disagree with the Decision.

[34] For example, the Applicants assert that the RPD "fail[ed] to consider all possible grounds for claiming refugee status," even those not raised by the Applicants. Nowhere, however, do the Applicants say what other possible grounds for refugee status were before the RPD on the present facts. Hence, it is not possible for the Court to see what reviewable error may have occurred in this regard. There is no obvious alternative ground that suggests itself to the Court, and the Decision itself says that the RPD finds "there is no nexus to a Convention ground. That is to say, you did not fear these people on the basis of your nationality, race, religion or political opinion. Nor do I find that you are members of a particular social group in terms of your fear." This indicates to me that the RPD looked for all possible grounds of connection.

[35] The Applicants also say that the RPD “failed to take into consideration the fact that the claimants were ‘unrepresented’ claimants with serious psychological/emotional problems and more care ought to have been afforded to the principal [female] claimant.” But there is no evidence of a lack of care in this regard. The RPD simply could not find a connection between what had happened to the Applicants and the earlier experience of the daughter and son-in-law.

[36] The Applicants’ strongest point is that the RPD fails to refer specifically to the counselling assessment dealing with the state of mind and frailty of the Female Applicant so that, in accordance with the principles enunciated in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425, the Court should infer that the assessment was overlooked.

[37] The assessment, of course, does not impact any of the specific findings regarding the Male Applicant.

[38] The central finding in the Decision is that the Applicants failed to establish, on an objective basis, that anything that may have happened to them in El Salvador could be connected with the experiences of the daughter and her husband, so that there could be no nexus to a Convention ground.

[39] In order to try and make that connection the Applicants went back to events in 2003 as well as events from 2007 and onwards. There was no objective evidence of a connection to a refugee

ground. The Applicants were, if anything, victims of generalized crime. It was not just the Female Applicant's inconsistent testimony that caused this claim to fail. Even if she was confused at the hearing, there was no objective evidence before the RPD of a link to a Convention ground. This finding is not contradicted by the counselling assessment. Hence, in my view, there was no need to reference the assessment specifically.

[40] Counsel also raised a new point at the hearing that the RPD failed to take into account the counselling assessment and the risks to the Female Applicant's health if she is returned to El Salvador. In my view, however, there is nothing in the assessment that would bring the Female Applicant within the risks set out in section 97 of the Act. She is not in need of protection from torture, death, or cruel and unusual treatment or punishment. The risks to the Female Applicant's health, which the Applicants are now belatedly raising, belong to a humanitarian and compassionate (H&C) analysis and there is nothing on the record to suggest that the Applicants cannot make an H&C application and they will be able to raise the counselling assessment at the appropriate time. Just because the Applicants are not Convention refugees does not mean that they do not have other avenues available to them if they wish to remain in Canada. This does not give rise to a reviewable error in this application.

[41] The Applicants also make assertions that are simply not borne out by an examination of the Decision in the record. For example, they say that "the Board member has failed to properly analyse the documentary information" on the nexus issue but, in the end, it is clear that the Board examined all of the evidence on this issue and came to a conclusion with which the Applicants disagree. This

is a matter that involves the weighing of evidence. The Applicants are simply asking the Court to weigh it again and come to a conclusion that favours them. This is not the role of the Court in judicial review. In *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315, Justice Robert Decary of the Federal Court of Appeal observed:

4. There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review

Relying upon this reading in *Petrova v. Canada (Minister of Citizenship and Immigration)*, [2004] FCJ No. 613 (FC), I stated:

55 The Court should not seek to reweigh evidence before the Board simply because it would have reached a different conclusion. As long as there is evidence to support the Board's finding of credibility and no overriding error had occurred, the decision should not be disturbed.

[42] Given the evidence before the RPD, its analysis of nexus was appropriate and reasonable. The Applicants' disagreement with the RPD's assessment of the weight assigned to evidence is not a ground on which to set aside a decision for reviewable error. See *Singh v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1146, [2003] F.C.J. No. 1451 at paragraph 11.

[43] The Applicants are naturally disappointed with the Decision, but the Decision is transparent and intelligible and falls within the range of possible, acceptable outcomes which are defensible in respect to the facts and law. See *Dunsmuir*, above, at paragraph 47.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed;
2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-1482-10

STYLE OF CAUSE: ELENA YOLANDA DURAN and
FRANCISCO OSWALDO ALVAREZ DURAN

Applicants

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: November 4, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** HON. MR. JUSTICE RUSSELL

DATED: December 10, 2010

APPEARANCES:

Ms. Roxanne Haniff-Darwent APPLICANTS

Ms. Camille Audain RESPONDENT

SOLICITORS OF RECORD:

Darwent Law Office APPLICANTS
Barrister & Solicitor
Calgary, Alberta

Myles J. Kirvan RESPONDENT
Deputy Attorney General of Canada