Federal Court Cour fédérale

Date: 20130524

Docket: IMM-5333-12

Citation: 2013 FC 551

Ottawa, Ontario, May 24, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

JOSE ANDRES CORTEZ
LUIS MARIO CORTEZ HERNANDEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA* or the Act] of a decision made by the Refugee Protection Division of the Immigration and Refugee Board (the panel), dated May 8, 2012, whereby it was decided that Jose Andres Cortez and his brother Luis Mario Cortez Hernandez (the Applicants), both citizens of El Salvador, were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97(1) of the Act. The determinative issue before the panel

was the availability of state protection in El Salvador. For the following reasons, I believe the intervention of this Court is warranted.

Facts

[2] The Applicants are brothers and citizens of El Salvador. Jose, the older brother, was born in 1976. Luis was born in 1982. Both Applicants have had problems with the Maras, a criminal and violent organized gang.

[3] In 2009, members of the Maras attempted to recruit Luis. Luis was told that he had to pay a "renta" if he did not join the gang. Luis refused to join the gang and began paying the renta. He could not always come up with the money. In February 2010, Luis was violently attacked by members of the Maras armed with a machete. His hands and face were severely injured.

[4] Members of the Maras also approached Jose and demanded he pay a renta. Jose paid some money but he too had trouble coming up with the full amount. In November 2009, three members of the Maras assaulted Jose, who was robbed and shot in the chest. He managed to escape and spent ten days in the hospital.

[5] In November 2010, both Applicants were involved in an incident in front of a variety store with two members of the Maras who demanded the renta and threatened to kill them. During the altercation that ensued, one of the Maras was injured and Jose was blamed for the incident. Fearing that the Maras would kill him in retaliation, Jose went into hiding at his uncle's home.

[6] Jose left El Salvador with his other brother Nixon on January 25, 2011, but Nixon was returned to El Salvador by American authorities. Luis then left El Salvador and caught up with Jose in the United States. They arrived together in Canada on July 25, 2011, and made a refugee claim that day.

The impugned decision

[7] The panel took no issue with the Applicants' credibility and considered that the risk they faced from the Maras was not generalized. The panel found, however, that the Applicants had not rebutted the presumption of state protection.

[8] The panel noted that the Applicants admitted to having made no attempt whatsoever to obtain police protection despite the seriousness of the attacks. The panel explained that El Salvador is a democratic country presumed capable of protecting its citizens, and that claimants who do not seek police protection must demonstrate with clear and convincing evidence why they did not do so (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689, [1993] SCJ No 74 [*Ward*]). The panel noted that the Applicants believed the police were in cahoots with the Maras, and that they had learned that the Maras had killed a neighbour who had refused to pay the renta after he had gone to the police. The panel also recognized that there is a problem of police corruption in El Salvador, and that there are enforcement issues with regards to gang-related crimes. The panel noted, however, but without referring to specific documentary evidence, that El Salvador has been fighting gangs and gang violence since 2000 through a variety of measures, including legislation that makes it illegal to be part of a gang. Considering the seriousness of the attacks, the panel found that it was reasonable

to expect the Applicants to seek some form of protection in El Salvador and that fear of retaliation was not a reasonable explanation for failing to seek police protection.

Issues

[9] This application raises only one issue, that is, whether the panel's state protection finding is reasonable.

Analysis

[10] The parties made no submissions with regard to the standard of review. It is settled law, however, that findings on state protection are to be reviewed on a standard of reasonableness: *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para 38, 282 DLR (4th) 413 [*Hinzman*]. In applying the reasonableness standard, a reviewing court must consider "the existence of justification, transparency and intelligibility within the decision-making process" as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190.

[11] In their memorandum, the Applicants (who were not represented by counsel at the time) argued that the panel failed to analyze the issue of generalized risk and failed to conduct an individualized inquiry. Yet, it is clear from the panel's reasons that it accepted that the Applicants did not fall into the category of persons who were not in need of protection because the risks they feared would be faced generally by other individuals in or from that country. At the hearing, counsel for the Applicants conceded that generalized risk was not an issue.

[12] The Applicants argue that the panel failed to consider their explanation for not going to the police, that is, that they believed that police were in cahoots with the Maras, that their father had told them going to the police would further jeopardize their security, and that they knew of a neighbour who was killed by the Maras after he had made a denunciation to the police.

[13] The Applicants further argue that the panel failed to consider documentary evidence that shows that police protection in El Salvador is inadequate. The Applicants cite only one document, the U.S. Department of State Report on El Salvador for 2011, which speaks of "widespread corruption, particularly in the judicial system; weaknesses in the judiciary and the security forces that led to a high level of impunity; and violence and discrimination against women". While this Report was published on May 24, 2012, and therefore some weeks after the RPD decision, the 2010 U.S. Department of State Report on El Salvador is substantially to the same effect.

[14] It is trite law that the onus was on the Applicants to rebut the presumption of state protection. Absent a complete breakdown of the state, a state is presumed to be capable of protecting its nationals. To rebut this presumption, an applicant must produce clear and convincing confirmation of a state's inability to protect. State protection need not necessarily be perfect, but rather adequate. The more democratic the state, the more an applicant must have done to exhaust all avenues of protection available. Only in exceptional circumstances will an applicant be exempt from seeking state protection: see, *inter alia*, *Ward* at 709, 724-725; *Hinzman* at paras 41, 43-44; *Mendoza v Canada (Minister of Citizenship and Immigration)*, 2010 CF 119 at para 33, 88 Imm LR (3d) 81; *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paras 18, 30, 69 Imm LR (3d) 309.

[15] That being said, there will be situations where an applicant's failure to approach the state will not be fatal, essentially in those situations where state protection might not reasonably have been forthcoming. As the Supreme Court stated in *Ward* at 724, "…it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness".

[16] In other words, a contextual approach is required when assessing the availability of state protection and whether an applicant has rebutted the presumption of state protection. As the Supreme Court recognized in *Ward*, at 724-725, clear and convincing confirmation of a state's inability to protect may sometimes be established through the testimony of similarly situated individuals let down by the state protection arrangement or through the applicant's testimony of past personal incidents in which state protection did not materialize.

[17] In the case at bar, the panel did consider the Applicants' explanations for failing to seek police protection. At paragraph 15 of its reasons, the panel notes that the Applicants believe that police officers are in cahoots with the gangs and that they feared a denunciation would further jeopardize their security. This explanation, in and of itself, would clearly not be sufficient, as subjective fear alone is not enough to rebut the presumption of state protection: see, for example, *Paguada v Canada (Minister of Citizenship and Immigration)*, 2009 FC 351, [2009] FCJ No 401.

[18] At paragraph 16, the panel also noted that Luis knew of someone in a similar situation who was killed by the Maras after having gone to the police. While the Applicants did not provide details or independent evidence about the incident involving this other individual, the panel did find the

Applicants' entire testimony credible. In such circumstances, it was no answer simply to comment that this is the view not only of the Applicants but also probably of many people from El Salvador with respect to the police.

[19] Finally, the panel referred to the documentary evidence (without identifying any particular document) and noted that El Salvador has been fighting gangs and gang violence for years, that there have been, at times, unintended consequences such as violations of human rights and prison over-crowding, that enforcement of the new anti-gang law is far from acceptable, and that huge resources are dedicated to this purpose. The panel, however, somehow trivialized the challenges faced by the Salvadorian law enforcement authorities when it stated, at paragraph 21:

> There may be criminal connections, indeed there probably are criminal connections, in every police force in the world. Fear of retaliation by perpetrators is, similarly, a fear on the part of every victim who must report and complain and sometimes testify against their perpetrators. This is a huge problem in every judicial system, including in Canada. This is not a reason which justifies granting international refugee protection.

[20] Such a blanket statement, in my view, belittles and seriously misrepresents some of the very credible evidence found in the National Documentation Package on El Salvador. A careful reading of the document entitled *No Place to Hide: Gang, State and Clandestine Violence in El Salvador* from the International Human Rights Clinic of the Harvard Law School (2010) shows, in particular, that people who refuse to join the Maras and to pay the renta are targeted and particularly at risk. Far from being an improvement, it appears that the witness protection program offers no effective protection to witnesses after the trial is over, and may even put witnesses more at risk because the authorities, in relying almost exclusively on witnesses in court to obtain convictions, are effectively

sending the message to gang members that they should get rid of these witnesses if they want to avoid being sent to jail. In light of that evidence, the panel's statement that "enforcement of that law is not at high levels yet" appears to be, at best, an understatement.

[21] The role of this Court, of course, is neither to reweigh the evidence nor to replace the decision with that which the Court would have made in the first place. It is also trite law that the panel does not have to refer to each document on the record, and that it is presumed to have considered all the evidence. The panel had an obligation, however, to specifically mention and analyze the evidence that seems to contradict its findings. As the Federal Court of Appeal stated in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, 83 ACWS (3d) 264 at para 17:

> …the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": Bains v. Canada (Minister of Employment and Immigration) (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts.

In the absence of any explicit reference to or analysis of the extensive documentation contained in the National Documentation Package, it is impossible to determine whether the assessment of the evidence on state protection by the panel is reasonable.

[22] For all of these reasons, I am therefore unable to find that the Board's conclusion, according to which the Applicant had failed to rebut the presumption of state protection, is reasonable. Accordingly, the decision must be quashed and the matter remitted to the Immigration and Refugee Board for re-determination by a differently constituted panel. No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is granted. No question is certified.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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