Federal Court  Cour fédérale

Date: 20140626

Docket: IMM-3864-13

Citation: 2014 FC 622

Ottawa, Ontario, June 26, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

MARCOS JAIRO AMADOR SOTO,
BRENDA DEL CARM AMADOR ALMENDAREZ,
BRYAN JARED AMADOR,
EMILY LURDES AMADOR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The principal Applicant, Mr. Marcos Jairo Amador Soto, his wife Brenda Del Carm Amador Almendarez and their children Bryan Jared Amador and Emily Lurdes Amador, are seeking judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) of a decision of the Refugee Protection Division of the Immigration

and Refugee Board of Canada (the RPD or the Board). The decision, rendered on May 21, 2013, dismissed the Applicants' refugee protection claim pursuant to section 96 and subsection 97(1) of the *IRPA* because the Board did not find the Applicants to be Convention refugees or persons in need of protection.

[2] For the reasons that follow, I have found that the decision of the Board was reasonable and that this application for judicial review ought to be dismissed. The Applicants failed to convince me that the Board erred in not considering the compelling reasons proviso in subsection 108(4) of the *IRPA*, as the pre-conditions to the proviso's application were not present in this case.

I. Facts

[3] The principal Applicant and his wife are citizens of Nicaragua. Their two children are citizens of the United States.

[4] The principal Applicant alleges that he was forced to join the military in January 1988 as military service was mandatory at that time in Nicaragua. He alleges that he deserted the military on October 12, 1989 because he was in the military service involuntarily and also because he was against the Sandinista ideals, the government in power at the time. He was captured on October 20, 1989 and imprisoned until February 1990. While in prison, he suffered severe beatings, humiliation and mistreatment.

[5] The principal Applicant was released from prison in February 1990 by President Violeta Chamorro when she unseated Daniel Ortega and then released those prisoners who had not complied with Ortega's mandatory military service requirement. In 2002, rumours indicated that the former president, Daniel Ortega, would be regaining power. The principal Applicant began to worry and it is alleged that he left Nicaragua on June 4, 2003 and travelled to Florida. He remained in the United States until December 2011.

[6] The principal Applicant also alleges that in 2009 and 2010, military men approached his mother in Nicaragua looking for him. He testified that she was too afraid to send him a letter of support, with the fear that the military might find the letter through the post office or customs.

[7] The principal Applicant and his family entered Canada on December 28, 2011 and filed a refugee protection claim that same day.

II. Decision under review

[8] The RPD found that the principal Applicant is credible and that he established a subjective element of fear; however, there was insufficient evidence to support the objective element of fear under section 96 of the *IRPA* or to establish risk of harm under subsection 97(1) of the *IRPA*.

[9] The RPD also found that the principal Applicant established imputed political opinion as a nexus since he fled the army under the Sandinista government because he was against its principles. In that respect, the RPD wrote:

> Section 96, Convention refugee: you testified that you deserted the army in 1989 because you were wounded on your left shoulder and right leg. You couldn't sleep and you were scared after this happened. Although you were given a number of opportunities, you did not testify that you had any political reasons for defecting from the army. Nonetheless, I find that you have established nexus, imputed political opinion for the following reasons.
>
> You testified that you did not want to join the army but mandatory service was required at the time and you were forced to join the army. You testified that the army, under the Sandinista Government under Ortega did not follow human rights the way other countries might. Further, your counsel argued and I agree that you have established imputed political opinion as a nexus but I do not agree with the argument regarding membership in a particular social group as a military deserter on the facts of your case.
>
> Applicants' Record, p 59

[10] Nevertheless, the RPD noted that military service is not in itself considered persecution under refugee law. An aversion to military service is not sufficient to support a well founded fear of persecution.

[11] The RPD determined that the principal Applicant was officially released from prison after serving his time. There was no evidence that President Ortega had reneged on President Chamorro's decision or persecuted any of the released prisoners in similar situations. The Board then wrote:

> Nonetheless, I find that given the history between President Ortega, the Sandinistas and the army in Nicaragua during the revolution and then after, and the fact that you deserted the army during combat and that you testified that you were called a coward after you were arrested and horribly treated while in prison because of your desertion, I find that your actions in your particular circumstances establish imputed political opinion as you acted contrary to the political interests of the army and the Ortega government at the time in 1989.

Applicants' Record, pp 59-60

[12] The Board then went on to find that the principal Applicant did not experience any persecution from 1990 to 2003 while in Nicaragua. The principal Applicant had testified that military men under Captain Escoto, who continued to have military power even after Ortega was no longer president, were being sent to ask for his whereabouts but no persecution was experienced. The RPD noted that the military was in fact the same army that continued under President Chamorro.

[13] The RPD concluded that the principal Applicant would not face more than a mere possibility of persecution if he were to return to Nicaragua. The RPD noted that the army, at the hands of which the principal Applicant was persecuted, remained in power throughout the 13 years he spent in Nicaragua following his release from prison and was never able to find and persecute him despite his frequent visits to his hometown where his mother lived and the fact that Nicaragua is a relatively small country.

[14] The RPD added that even if the subjective element of fear were made out, the objective element was not, as there is no evidence that the motivation and inclination of the military to harm the principal Applicant exists almost 23 years later.

[15] The RPD also found that the principal Applicant will not face a risk of harm to life or cruel or unusual punishment or torture because of the military's alleged interest in him. The RPD made reference to the National Documentation Package (NDP) 2.1, the U.S. Country Report on Nicaragua, and noted that while there are problems with corruption and impunity among

Nicaragua's security forces, there have been no reports of political prisoners, detainees or disappearances.

III. Issues

[16] This application for judicial review raises the following three issues:

A. Did the RPD err as to the appropriate period to consider when assessing the principal Applicant's objective fear?

B. Did the RPD err in its assessment of the country conditions and the characterization of the principal Applicant's claim?

C. Should the RPD have considered section 108(4) of the *IRPA*?

IV. Analysis

[17] The standard of review applicable to the Board's evaluation of the principal Applicant's objective fear is reasonableness: *Moreno v Canada (Minister of Citizenship and Immigration)*, 2011 FC 841, at para 7. The same is true with respect to the second issue, as it clearly raises a question of mixed fact and law: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, at paras 46 and 61.

[18] The question as to whether or not subsection 108(4) ought to have been considered has in the past been evaluated on a standard of correctness: see, for ex., *Idarraga Cardenas v Canada (Minister of Citizenship and Immigration)*, 2010 FC 537, at para 19; *Decka v Canada (Minister of Citizenship and Immigration)*, 2005 FC 822, at para 5. Following the Supreme Court of

Canada's decision in *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, the trend has been to apply the reasonableness standard, as this is clearly a question of law within the specialized expertise of the tribunal: *Sivapathasuntharam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 486, at para 14; *Kostrzewa v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1449; *Nzayisenga v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1103; *Niyonzima v Canada (Minister of Citizenship and Immigration)*, 2012 FC 299; *Sow v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1313, at para 21; *Horvath v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1132, at para 53; *Alharazim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1044, at paras 16-25 [*Alharazim*]; *S.A. v Canada (Minister of Citizenship and Immigration)*, 2010 FC 344, at para 22. *Contra: Subramaniam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 843.

A. *Did the RPD err as to the appropriate period to consider when assessing the principal Applicant's objective fear?*

[19] The principal Applicant claims that the reasoning of the Board is incoherent and internally inconsistent. While the Board found that there is subjective fear of persecution, it also found that there is no objective fear as during the 13 years that he was in Nicaragua, he did not encounter any problems. The principal Applicant submits that the Board should not have considered the objective fear during the 13 year period before Ortega's return to power but the period of time since 2006 when Ortega was once again president. The principal Applicant argues that considering the objective fear from a government that is not in power is "pointless".

[20] I find this argument unpersuasive. First, it cannot be said that the Board did not consider the principal Applicant's risk under the current Ortega government at all. When asked whether he "knew of any other previous military deserters who had now returned later to Nicaragua and who faced persecution by Ortega's government or military", the principal Applicant testified that he did not. This was clearly an attempt from the Board to assess the prospective risk of persecution the principal Applicant would be facing if removed to Nicaragua post 2006. The Board also considered the absence of any evidence (in particular from his mother) to the effect that some military men had come looking for the principal Applicant, and the fact that 23 years have passed since he was released from prison. It then concluded:

> I find that you served your time for military desertion. You were officially released by President Chamorro and there is not sufficient evidence to show that President Ortega or his military have looked for former military deserters and persecuted them or have looked for you in particular. Accordingly, I find that you would not face more than a mere possibility of persecution given the absence of evidence to support the motivation and inclination of the military to harm you or threaten you over the past 23 years.
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> Applicants' Record, p 61

[21] On the basis of the evidence that was before the Board, this finding is entirely reasonable. As for the argument that it was irrelevant to consider the objective evidence of risk from 1990 to 2003, when the Ortega government was not in power, I once again beg to differ with counsel for the Applicants. Counsel for the Applicants argued that hostile elements of the armed forces will inevitably pose a greater risk when they are supported by a hostile government than when the government is sympathetic to the principal Applicant and at cross purposes to the hostile elements of the armed forces. This would be a compelling argument if it were not for the contradictory testimony given by the principal Applicant. He stated that "the army has always

been the same" and "has never been changed" whether under Violeta Chamorro or Daniel Ortega. He went as far as saying that he feared the army under President Chamorro as well, and that "[t]he problem is not with the President, it's with the army, which is the same" (Tribunal Record, pp. 13-14). On that basis, and bearing in mind that the main reason for deserting the army was not his opposition to the Sandinistas on ideological grounds but his dislike and fear of being in the army, the Board's focus on the army's interest in the principal Applicant rather than on the incumbent President was the correct focus and clearly reasonable.

B. *Did the RPD err in its assessment of the country conditions and of the characterization of the principal Applicant's claim?*

[22] Counsel for the Applicants submits that the Board failed to consider that the principal Applicant could become a target of threats and worse, from those seeking impunity. Relying on a report from Freedom House (Nicaragua, Freedom in the World 2011), it is argued that false corruption charges are levied against perceived opponents of the government, and that the principal Applicant could therefore be accused of ordinary crimes. The Board considered whether there is any risk for him because he fled the army, but not whether there is risk for him because of his perceived political opposition of the regime that was in effect when he was in the military and which has been back in power since 2006.

[23] I agree with the Respondent that this argument ignores the content of the country conditions information as well as the facts of this case. The only documentary evidence upon which the principal Applicant relies shows, indeed, that some political opposition figures may be charged with corruption-related crimes unfairly and due to political motivations. The Country

Reports on Human Rights Practices for 2011 from the U.S. State Department also shows that there is government intimidation and harassment of journalists and independent media, and politically motivated killings. However, the principal Applicant does not fit the profile of those being targeted by the government; he is merely one of many citizens who deserted mandatory military service 23 years ago.

[24] It is no doubt true, as argued by the principal Applicant, that he did state in his Personal Information Form that he deserted the army not only because he was conscripted but also because he was against the Sandinista ideals. However, at the hearing, he did not once state that he had quit the army on account of political reasons, despite being repeatedly asked whether he had any other motives for quitting the army besides having been enlisted involuntarily, being wounded, developing a nervous problem, and the fear of being harmed. There is no evidence either that he ever had any political involvement. I agree with the Respondent that the mere fact the government may have perceived military desertion as a political act, and that the principal Applicant could therefore be described as having been targeted for political opinion, is insufficient to conclude that he would now face more than a mere possibility of persecution if returned to Nicaragua, or that on a balance of probabilities he would face a risk to his life or cruel and unusual treatment or punishment or torture. The Board could reasonably conclude that the government or the military does not have the motivation or inclination to pursue the principal Applicant 23 years after his release from prison.

C. *Should the RPD have considered section 108(4) of the IRPA?*

[25] The Applicants allege that it was incumbent on the Board to consider subsection 108(4) of the *IRPA*. This subsection reads as follows:

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:	108. (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :
…	…
(e) the reasons for which the person sought refugee protection have ceased to exist.	e) les raisons qui lui ont fait demander l'asile n'existent plus.
…	…
Exception	Exception
(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.	(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

[26] According to the jurisprudence of this Court, two conditions must be met before the Board is required to undertake a s. 108(4) analysis to determine whether there are sufficient compelling reasons to grant refugee status: 1) the applicant must establish that, at some point, he or she met the definition of a Convention refugee or protected person; and 2) that the reasons for the claim have ceased to exist due to changed country conditions: see *Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635, at paras 5-6; *Goksu v Canada (Minister*

of Citizenship and Immigration), 2009 FC 382, at para 41; *Kudar v Canada (Minister of Citizenship and Immigration)*, 2004 FC 648, at para 10; *Luc v Canada (Minister of Citizenship and Immigration)*, 2010 FC 826, at para 32.

[27] I agree with counsel for the Applicants that where compelling reasons arising out of previous persecution are relevant to the determination of a refugee protection claim, the compelling reasons proviso must be explicitly considered, whether raised by the refugee protection claimant or not. The Board cannot avoid the issue of compelling reasons by not making an explicit finding about past persecution: *BTB v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1181; *Yamba v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 457; *Nagaratnam v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1208; *Rose v Canada (Minister of Citizenship and Immigration)*, 2004 FC 537.

[28] Counsel for the Applicants concedes that there are two lines of authority with respect to the first requirement. Justice Crampton in *Alharazim* stated that there must be *prima facie* evidence of past persecution that rises to the level of being appalling or atrocious. Another line of authority, as exemplified in *Kumarasamy v Canada (Minister of Citizenship and Immigration)*, 2012 FC 290, holds that it is sufficient if the claimant is seriously and personally affected by past persecution for the compelling reasons to apply. A question was certified in that last mentioned case, but the appeal was discontinued.

[29] In the case at bar, counsel for the Applicants submits that the issue is not material, since the Board member referred to the persecution the principal Applicant suffered as "severe" and

wrote that he was "horribly treated", which would meet the higher threshold for past persecution. Even if such is the case, the Board never made a finding that the principal Applicant had, at some point in the past, met the definition of a Convention refugee or a person in need of protection. While the Board did accept that he had been mistreated in 1989-1990 for an imputed political opinion, that in and of itself does not mean that he met one of the definitions, which is a requirement for a finding under s. 108(1)(e) of the *IRPA*. As previously mentioned, the Board found that there was not enough evidence to support an objective element of well founded fear if he was to return to Nicaragua. In this respect, this case is very similar to *Henry v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1084, at para 44 where Justice Noël wrote:

> …while the RPD did recognize that the Applicant has been victim of abuse tantamount to persecution, never at any point did it consider the Applicant to be a refugee or a person in need of protection. In fact, the RPD found that the Applicant's fear was not well founded as he failed to demonstrate the existence of a prospective risk. As a matter of fact, the RPD rejected the Applicant's claim because he did not satisfy the necessary conditions in order to be considered a refugee or a person in need of protection. As such, the exception enacted in paragraph 108(1)(e) was not applicable and, consequently, the RPD was in no way obligated to undertake a "compelling reasons" assessment under subsection 108(4) of the IRPA.

[30] Moreover, the second requirement for the application of the compelling reasons proviso is not met either. This provision is meant to apply in situations where the applicant has fled at a time where the agent of persecution was in power and, at the time of the refugee application, this agent is no longer in power. The principal Applicant acknowledges that this is the typical situation wherein this provision will apply, but suggests that it needs not be so limited. I disagree. A careful reading of subsection 108(1)(e) in conjunction with section 108(4) undoubtedly shows that the compelling reasons proviso is meant to address a situation where the

reasons for which a claimant sought refugee protection cease to exist, i.e. where the circumstances have changed. As stated by the Federal Court of Appeal with respect to subsection 2(3) of the predecessor *Immigration Act*, the provision should be read "as requiring Canadian authorities to give recognition of refugee status on humanitarian grounds to this special and limited category of persons, i.e. those who have suffered such appalling persecution that their experience alone is a compelling reason not to return them, even though they may no longer have any reason to fear further persecution": *Canada (Minister of Employment and Immigration) v Obstoj*, [1992] 2 FC 739.

[31] In the case at bar, there has been no real change of circumstances. As previously mentioned, the principal Applicant feared the army more than the government and the fact that little had changed with the election of the Chamorro government in 1990. The reason that the principal Applicant sought refugee protection was that he was afraid that if the Ortega government returned to power, his problems with the army might become more complicated than he alleged they previously were in 2003 when he left his country. Therefore, the reasons for which the principal Applicant sought refugee protection have not ceased to exist; to the contrary, the circumstances would have worsened with the election of Daniel Ortega in 2006, at least from the principal Applicant's perspective. There was accordingly no need for the Board to make a s. 108(4) finding.

V. Conclusion

[32] For all of the foregoing reasons, I have come to the conclusion that this application for judicial review must fail.

[33] Counsel for the Applicants proposed two questions for certification:

> For the compelling reasons provision in Immigration and Refugee Protection Act section 108(1)(e) to be considered by the Refugee Protection Division of the Immigration and Refugee Board, does the Board have to make an express finding
>
> a) of past persecution or is evidence of past persecution which the Board accepts as credible sufficient?
>
> b) that the refugee protection claimant was at one time a Convention refugee with a well founded fear of persecution or is either a finding of past persecution or evidence of past persecution which the Board accepts as credible sufficient?

[34] Subsection 74(d) of the *IRPA* requires that only serious questions of general importance be certified. In addition, in order to be certified, a question must be one that is determinative of the appeal: *Canada (Minister of Citizenship and Immigration)* (1994), 176 NR 4 (FCA), at para 4.

[35] I agree with the Respondent that the questions proposed by the Applicants would not dispose of the case at bar. I have found that subsection 108(4) of the *IRPA* was not triggered on the facts of this case not only because the principal Applicant has not established that he had, at some point in the past, met the definition of a Convention refugee or a person in need of protection, but also because there has been no change of circumstances. The questions proposed by the Applicants only relate to the first rationale underlying my finding that section 108 does not come into play in this case, but find no application with respect to the second rationale.

[36] Counsel for the Applicants argues that the legislation says only that there has to be a change of circumstances, not that there has to be an express finding of change of circumstances.

This argument is somewhat specious and runs counter to the jurisprudence referred to earlier in these reasons. There must clearly be an assessment that circumstances have changed before the compelling reasons proviso can be applied. Be that as it may, I fail to see how an answer to the two questions proposed by the Applicants could be determinative of the issue relating to the change of circumstances.

[37] In the result, I am of the view that no question ought to be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	MARCOS JAIRO AMADOR SOTO, BRENDA DEL CARM AMADOR ALMENDAREZ, BRYAN JARED AMADOR, EMILY LURDES AMADOR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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