Federal Court Cour fédérale

Date: 20170616

Docket: IMM-2355-16

Citation: 2017 FC 601

Ottawa, Ontario, June 16, 2017

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

EDDY HARTONO
STEVANI NG

Applicants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Eddy Hartono and his wife, Ms. Stevani Ng, are citizens of Indonesia who allege to be Christians of Chinese ethnicity.

[2] Mr. Hartono alleges that he left Indonesia for the United States in January 2000, after being assaulted and robbed in April 1999 by Muslim individuals. In 2002, he claimed asylum in the United States but his claim was denied in 2004. He continued to live there without status until he returned to Indonesia in 2014.

[3] Ms. Ng claims that while she was attending a Christian university in Jakarta in 2002, a Muslim mob stormed the campus and attacked students who were mainly of Chinese origin. Despite being unharmed by the mob, she was left traumatized. After obtaining her degree in accounting in 2004, Ms. Ng travelled to the United States in 2005 to study English as she wanted "a break from Indonesia". She met Mr. Hartono in 2006 and they were married in 2007. She did not claim asylum in the United States and allowed her status to lapse. In 2011, she returned to Indonesia because her mother was ill. In December 2013, she opened a small shop in Jakarta, along with her sister. When Mr. Hartono returned to Indonesia in December 2014, he assisted her at the shop.

[4] The Applicants claim that in February 2015, as they were heading to a local shopping center, they were victims of an armed robbery by Muslim men on motorcycles. The men insulted and robbed them and beat Mr. Hartono. Having stolen a piece of identification, the men sought out the Applicants at their residence three (3) days later. The Applicants were robbed, threatened and taunted with racial slurs. The Applicants went to the police but the police would not take a report. A few days later, the Applicants travelled to Singapore to "calm down" and then returned to Indonesia.

[5] The Applicants applied for visitors visas to Canada in March 2015. They were admitted in Canada in April 2015 and sought refugee protection one (1) month later, claiming to fear persecution in Indonesia because of their ethnicity and their religion. Ms. Ng also claimed gender-based persecution.

[6] In a decision dated October 30, 2015, the Refugee Protection Division [RPD] rejected their claim, concluding that they were neither "Convention refugees" nor "persons in need of protection" under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The RPD found that the Applicants' travel history and behaviour was inconsistent with that of persons who feared persecution or a risk of harm if they returned to their country of origin. The RPD also found that the Applicants' objective fear of persecution was not corroborated by the documentary evidence. Finally, the RPD found that the Applicants claimed asylum in Canada because they were victims of robbery in Indonesia and that their risk of being targeted as merchants was not different than that faced by other individuals with the same economic and business profile in Indonesia.

[7] The Applicants appealed the RPD's decision to the Refugee Appeal Division [RAD]. On May 16, 2016, the RAD dismissed their appeal and upheld the RPD's decision.

[8] The Applicants now seek judicial review of the RAD's decision. They submit that the RAD engaged in an unreasonable assessment of the Applicants' credibility and that it engaged in an insubstantial and unreasonable assessment of the Applicants' past and future persecution, particularly in relation to its assessment of country conditions.

II. Analysis

A. *Standard of review*

[9] The reasonableness standard of review applies when this Court is reviewing the RAD's determination on a question of mixed fact and law (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35). The Court should not intervene if the RAD's decision is justifiable, transparent and intelligible and if it falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[10] Moreover, it is not the function of this Court upon judicial review to substitute its own view of a preferable outcome and to reweigh the evidence that was before the RAD and the RPD (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59, 61). The RAD's decision "should be approached as an organic whole, without a line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14, 16; *Gong v Canada (Citizenship and Immigration)*, 2017 FC 165 at para 7).

[11] As for issues of procedural fairness, the courts have consistently held that the applicable standard of review is correctness. When reviewing a decision on the basis of correctness, the question that arises is not whether the decision was "correct", but rather whether, in the end, the process followed by the decision-maker was fair (*Majdalani v Canada (Citizenship and*

Immigration), 2015 FC 294 at para 15; *Hashi v Canada (Citizenship and Immigration)*, 2014 FC 154 at para 14).

B. *The RAD's credibility assessment*

[12] The Applicants argue that the RAD unreasonably questioned Ms. Ng's subjective fear by rejecting her explanation that she did not seek asylum in the United States because one can only claim protection within a year of arrival in the country. According to the Applicants, the RAD unreasonably inferred that because Mr. Hartono had been able to claim protection after a year from his arrival in the United States, Ms. Ng would be able to do the same.

[13] The Applicants also argue that it was unreasonable for the RAD to conclude that Mr. Hartono had exhibited a lack of subjective fear by returning to Indonesia because this would most likely forfeit his claim on a United States "irregular migrant regularization initiative". The Applicants state that this issue was not raised by the RPD and that the failure to give Mr. Hartono the opportunity to respond to the argument is unfair and constitutes a breach of procedural fairness. Moreover, this finding is unreasonable as it relies on facts which are not in evidence. According to the Applicants, the RAD "deceptively" inferred that there was a strong possibility that Mr. Hartono would be able to regularize his status by relying on presidential programs which did not apply to Mr. Hartono's situation.

[14] Finally, the Applicants argue that it was a breach of natural justice for the RAD to raise a new issue like an internal flight alternative [IFA] without giving the Applicants the opportunity to respond.

[15] I am not persuaded by the Applicants' arguments.

[16] With respect to Ms. Ng, I am of the view that the RAD's comments must be considered in their proper context. The RAD was simply addressing some of the arguments raised by the Applicants in their memorandum on appeal before the RAD. Specifically, the Applicants acknowledged at paragraph 15 of their memorandum that the RPD was concerned with their actions being incompatible with subjective fear, principally due to the travel history of Ms. Ng, her failure to claim protection in the United States as well as the Applicants' trip to Singapore and that they had remained at the same address subsequent to the February 2015 attacks. The Applicants' submissions before the RAD also referred to their submissions before the RPD in which Ms. Ng provided an explanation as to why she did not claim protection in the United States. It was the Applicants' contention before the RAD that the RPD had not addressed Ms. Ng's explanation namely that there was only a twelve (12) month window from the claimant's arrival in the United States during which a claimant could seek protection. Essentially, Ms. Ng had relied on community sources with some indirect legal backing to the effect that once the small window had closed she would wait to gain permanent status through an amnesty.

[17] It is in this context that the RAD discussed the failure of Ms. Ng to claim asylum while in the United States. Recognizing that the RPD had not addressed her explanation for failing to claim protection in the United States, the RAD remarked that Ms. Ng could have sought legal advice to fully investigate the possibility of claiming protection in the United States as she was

someone with education, travel experience and resources. The RAD then noted that Mr. Hartono had made a claim in 2002, more than a year after arriving in 2000.

[18] Moreover, I am of the view that the RAD's finding regarding Ms. Ng's lack of subjective fear is not based solely on her failure to claim asylum in the United States but rather on her travel history and her failure to claim protection in any of the countries she travelled to after returning to Indonesia in 2011. The evidence demonstrates that she travelled to Thailand and Singapore in 2011 and 2012 and to the United Kingdom, France and Vancouver in 2013. Additionally, when Mr. Hartono joined her in December 2014, they travelled together to Macao, Hong Kong, Singapore and Malacca, Malaysia. Each time, they returned to Indonesia.

[19] The Applicants argued before the RAD and the RPD that their travels occurred prior to the February 2015 incident. However, their behaviour following the attack does not support a subjective fear of persecution thereafter. The RAD properly noted that after the incident, the Applicants went to Singapore to "calm down". Moreover, the record also demonstrates that the Applicants returned to Indonesia and worked and lived at the same place until their departure in April 2015.

[20] This Court has consistently held that the voluntary return of a claimant to his or her country of origin is behaviour that is incompatible with a subjective fear of persecution (*Milovic v Canada (Citizenship and Immigration)*, 2015 FC 1008 at para 11 [*Milovic*]; *Munoz v Canada (Citizenship and Immigration)*, 2006 FC 1273 at para 20 [*Munoz*]).

[21] Moreover, this Court has also held that while a delay in claiming refugee protection is not determinative with respect to the outcome of a refugee claim, it may constitute sufficient grounds for rejection in the right circumstances (*Milovic* at para 17; *Licao v Canada (Citizenship and Immigration*), 2014 FC 89 at paras 50-53; *Munoz* at para 22; *Ayub v Canada (Minister of Citizenship and Immigration*), 2004 FC 1411 at paras 14, 15).

[22] Accordingly, it was entirely reasonable for the RAD to conclude that Ms. Ng's subjective fear was not credible given her travel history and failure to claim in any of the countries she travelled to.

[23] Concerning the Applicants' argument relating to Mr. Hartono, the RAD noted "the strong possibility that some form of regularization" might be considered for non-criminal undocumented migrants who have been living in the United States for some time. The RAD then stated that by likely renewing his Indonesian passport (having entered the United States in 2000 and the passport being valid until 2016) and openly leaving the United States in 2014, Mr. Hartono was exhibiting a lack of subjective fear since leaving the United States would likely result in Mr. Hartono forfeiting his claim to a "U.S. irregular migrant regularization initiative".

[24] The Applicants submit there was a breach of procedural fairness as this issue was not raised by the RPD in its decision, the parties did not have the opportunity to respond and it is not supported by the record.

[25] I disagree with the Applicants. The RAD did not raise a new issue as the issue was raised both in Mr. Hartono's Basis of Claim form [BOC] and in the Applicants' memorandum of appeal before the RAD. Specifically, Mr. Hartono stated in his BOC narrative that after his refugee claim was rejected by the United States, he remained there without status as he was not ordered to leave. He further stated that "[p]eople in the community started to talk about an amnesty. [He] kept waiting, but the amnesty never materialized". It is in the context of responding to those statements that the RAD referred to the regularization initiative. Since the issue of a possible amnesty was raised by the Applicants to explain their failure to leave the United States, there was no obligation for the RAD to give them an opportunity to respond.

[26] As for the Applicants' argument that the policies referred to by the RAD were not in evidence, even if this is so, I do not find that the RAD committed a reviewable error in referring to them or that procedural rights were violated. The determinative issue for the RAD was clearly not the existence of the policies but rather the existence of the Applicants' subjective fear. Ultimately, the RAD concluded that given the Applicants' specific profiles and circumstances, they had not demonstrated subjective fear.

[27] Finally, the Applicants have failed to persuade me that the RAD raised a new issue of an IFA without giving them the opportunity to respond. In my view, the RAD did not make a finding of a possible IFA. Rather, in discussing the importance of the February 2015 incident, the RAD found that this incident did not amount to a sufficient risk to support a claim for protection in Canada given the Applicants' profiles. The RAD then noted that they had the resources which might allow them to hire security or the capacity to move to a different area of Indonesia and that

they had in fact gone to Singapore after the assault to "calm down". Ultimately, the RAD concluded that the risk posed by Muslim gangs was a generalized risk faced by all businesses, not just Chinese or Christian businesspeople. In the context of the RAD's discussion, I do not find that the RAD raised a new issue in violation of the Applicants' rights to procedural fairness.

C. *The RAD's assessment of the Applicants' past and prospective persecution*

[28] The Applicants submit that the RAD engaged in an unreasonable assessment of the Applicants' past and prospective persecution, particularly in relation to its assessment of country conditions. They argue that they refuted the RPD's characterization of country conditions in their memorandum of argument before the RAD and that they submitted new evidence to that effect. They contend that the RAD failed to do any substantive analysis of the documents and arguments provided and instead simply concluded that the RPD did not err.

[29] I disagree. The RAD noted that the Applicants had provided extensive arguments addressing the rise of Islamic fundamentalism and racial tension in Indonesia. It found after reviewing the evidence adduced by the Applicants that they were relying on general human rights documentation identifying cases from all areas of the country. The RAD then indicated that it should be kept in mind that Indonesia is a large, diverse and developing country with a population of more than two hundred and fifty (250) million people. The RAD then found that the Applicants' new evidence did not show that the country conditions had changed substantially such that the RPD's decision should be set aside. The RAD concluded that the RPD did not err in its balancing analysis of country documentation as they apply to the specific profile and circumstances of the Applicants.

[30] Overall, upon review of the RAD's decision, I find that the Applicants have failed to demonstrate that the RAD's finding regarding the assessment of the documentation on the country conditions is unreasonable.

[31] In conclusion, I am satisfied that there was sufficient evidence on the record to support a finding that the Applicants' behaviour and actions were inconsistent with the existence of a subjective fear of persecution or that they are at greater risk of harm if they return to Indonesia.

[32] Keeping in mind that the RAD's decision must be reviewed as an "organic whole", I find that the RAD's decision is reasonable as it falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law (*Dunsmuir* at para 47).

[33] For all of the above reasons, the application for judicial review is dismissed. No questions were proposed for certification and I agree that none arise.

JUDGMENT in IMM-2355-16

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and no question of general importance is certified.

"Sylvie E. Roussel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2355-16
STYLE OF CAUSE:	EDDY HARTONO, STEVANI NG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 10, 2016
JUDGMENT AND REASONS:	ROUSSEL J.
DATED:	JUNE 16, 2017

APPEARANCES:

Jessica Lipes	FOR THE APPLICANTS
Thi My Dung Tran	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jessica Lipes Solicitor	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT