Federal Court Cour fédérale

Date: 20180706

Docket: IMM-80-18

Citation: 2018 FC 705

Vancouver, British Columbia, July 6, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

REINA DE LA PAZ MOREIRA CHAVEZ

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada, dated November 27, 2017, which found the Respondent to be a Convention refugee [the Decision]. The Applicant is the Minister of Citizenship and Immigration [the Minister], who seeks to set aside the Decision and refer the matter back to the RPD for redetermination.

[2] As explained in more detail below, this application is dismissed, because I have found that the RPD did not err in granting Convention refugee status to the Respondent in the absence of particularized risk, in its state protection analysis, or in its internal flight alternative analysis.

II. Background

[3] The Respondent, Reina de la Paz Moreira Chavez, is a citizen of El Salvador. In 1999, she was attacked by unknown men. She was not robbed, but she was harmed physically, as a result of which she was hospitalized for approximately a week. In 2001, she left El Salvador and entered the United States [US]. As she explains in the narrative that accompanied her Basis of Claim [BOC] form, she did not make an asylum claim in the US, because she was able to obtain a work permit there. That permit was cancelled in approximately 2007, after which the Respondent remained in the US as an undocumented worker. She had expected that immigration reform would allow her to acquire legal status, but in 2017 she concluded that this was unlikely and, fearing deportation to El Salvador, she left the US and entered Canada on April 21, 2017.

[4] The Respondent claimed refugee protection in Canada. Her BOC describes the 1999 attack and explains that she has not recovered from the trauma of the attack. She states that while she was in the US, even without status, she felt safe and was able to suppress the memory of the attack. However, as the risk of deportation increased, she became more anxious and afraid and felt re-traumatized. She therefore decided to make a refugee claim in Canada, where her sister and her sister's family live.

III. Refugee Protection Division Decision

[5] The RPD summarized the allegations in the Respondent's BOC, including the 1999 attack. It also noted that, at the hearing, she testified as to the circumstances in which her father had been extorted and killed by criminal gang members in 1980. The RPD found the Respondent to be a credible witness and believed what she had alleged in support of her claim. However, it found that there was insufficient evidence that the perpetrators of the 1999 attack would remember her, pursue her, and harm her again if she were to return to El Salvador. It concluded that the attack was an act of random criminality.

[6] Nevertheless, the RPD performed a forward-looking assessment and concluded that the Respondent, as a woman of significant and particular vulnerabilities, would face a serious possibility of persecution should she return to El Salvador. This conclusion was based on the Respondent's profile as a single woman, with no education, returning to her country after many years, with little family support, and suffering from serious and lasting trauma, which made her resilience and resourcefulness limited.

[7] In support of its description of the Respondent's profile, the RPD noted that she is now 55 years old and testified that she did not graduate from high school, that she is not married, and that she had lived with her mother and two sisters before leaving El Salvador. The RPD stated that it appeared the Respondent has never lived on her own and that, while one of her sisters remained in El Salvador, they have not seen each other for 15 years and it could not be expected that the Respondent would be able to live with that sister and her family.

[8] The RPD observed that, because the Respondent had been out of the country for so long, her return would draw immediate attention to her. It also considered a psychologist’s report and found that the 1999 attack and the death of her father had had a lasting and dramatic impact on her, which affected her ability to cope and be resilient and made her a particularly vulnerable woman.

[9] The RPD then concluded that the country condition documentation [CCD] indicated that El Salvador is one of the most dangerous countries in the world for women, citing material from the National Documentation Package for El Salvador in support of this conclusion. It found that, given the Respondent’s vulnerable profile and the country conditions, she had established that she had a well-founded fear of persecution should she return to El Salvador.

[10] Turning to state protection, the RPD again cited material from the CCD, concluding that there was clear and convincing evidence that the state would be unable or unwilling to protect her, as the documentary evidence indicated that the security forces are corrupt and unable to offer protection to citizens against criminal groups.

[11] The RPD then considered the possibility of an internal flight alternative [IFA] within El Salvador but found that no viable IFA existed.

[12] The RPD therefore found that the Respondent was a Convention refugee because, upon returning to El Salvador, she would face a serious possibility of persecution based on her gender.

IV. Issues and Standard of Review

[13] The Minister raises the following issues for the Court's consideration:

A. Did the RPD err in granting Convention refugee status to the Respondent in the absence of particularized risk?

B. Did the RPD err in finding that state protection was unavailable to the Respondent?

C. Did the RPD err in finding that the Respondent does not have a viable IFA?

[14] The parties agree, and I concur, that these issues are to be considered on a standard of reasonableness, such that the role of the Court is to determine whether the Decision falls within a range of possible, acceptable outcomes, defensible in respect of the facts and law.

V. Analysis

A. *Did the RPD err in granting Convention refugee status to the Respondent in the absence of particularized risk?*

[15] The Minister notes that the Respondent did not initially assert a claim for refugee protection based on her gender. Rather, the narrative submitted in support of her BOC surrounds the attack she experienced in 1999. However, the transcript of the hearing before the RPD indicates that the possibility of a claim based on the Respondent's gender was raised during the hearing, and the Minister does not argue that it was an error on the part of the RPD to accept her claim based on a ground of that was not initially asserted.

[16] Rather, the Minister takes the position that the RPD erred by accepting the Respondent's claim in the absence of any personalized risk based on her particular circumstances. The Minister submits that there was no evidence before the RPD that the Respondent either was targeted or will be targeted personally. Rather, the RPD relied only on general country condition documents in support of its finding that she is at risk in El Salvador. The Minister relies on *Palacios v Canada (Minister of Citizenship and Immigration)*, 2011 FC 950 [*Palacios*], at paras 20-21, in support of its position that a claimant must establish a personalized risk based on his or her personal circumstances and that even a high risk that a person will be targeted as a victim of crime is not necessarily a particularized risk.

[17] I agree with the Respondent's position that *Palacios* does not assist the Minister, as the passages from the decision relied upon by the Minister relate to the Court's analysis of the availability of protection under s 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. While a personalized risk must be established to succeed in a claim for protection under s 97, this requirement does not apply to a claim for Convention refugee status under s 96 of IRPA.

[18] This is clear from *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250 (FCA), in which the Federal Court of Appeal held, at paragraph 16, that the then Refugee Division erred in concluding that, for the claimant in that case to be eligible for refugee status, he had to be personally a target of acts directed against him in particular. The Court explained, at paragraphs 17 and 19, that there is no need, in order to claim Convention refugee status, to show either personal persecution of the claimant, that there had been persecution of the

claimant in the past, or that the claimant would himself or herself be persecuted in the future.

The Court further adopted, at paragraph 18, the following description of the applicable law:

> In sum, while modern refugee law is concerned to recognize the protection needs of particular claimants, the best evidence that an individual faces a serious chance of persecution is usually the treatment afforded similarly situated persons in the country of origin. In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm for which the state is accountable, and if that risk is grounded in their civil or political status, then she is properly considered to be a Convention refugee.

[19] I therefore find no error on the part of the RPD in arriving at its finding that the Respondent was at risk of gender based persecution in the absence of particularized risk.

[20] The Minister also argues that the RPD committed errors in arriving at this finding based on the record before it. The Minister submits that the CCD does not indicate that only women are at risk in El Salvador but, rather, actually indicates that women are less likely than men to be killed in that country. I find no merit to this submission. The CCD referenced by the RPD in its decision indicates that, while men are far more likely to be murdered, women are significantly more likely to experience inter-familial, sexual, or economic violence and that, on top of everyday violence already faced by women, ongoing gang conflict has led to an increase in some of the most heinous acts of violence, including sexual violence, against women.

[21] The Minister also challenges aspects of the RPD's findings as to the Respondent's profile. The RPD's finding of risk was not based solely upon the Respondent's gender, or even

her profile as a single woman, but was also based upon her particular vulnerabilities. The Minister argues that there was no evidence supporting the RPD's conclusion that the Respondent would not be able to live with her sister who remained in El Salvador, which conclusion appears to underlie the RPD's description of her profile as including little family support. However, the evidence was that the Respondent had been away from El Salvador, where her sister lives, for 15 years. The Minister is correct that there was no particular evidence before the RPD as to the Respondent's relationship with her sister. However I do not regard the conclusion that she was unlikely to reside with her sister and the sister's family after a 15 year absence to be outside the range of acceptable outcomes. Certainly, the presence of the Respondent's one sister in El Salvador does not undermine the reasonableness of the RPD's description of her profile as returning to her country with "little" family support.

[22] The Minister similarly argues that the RPD unreasonably concluded that the Respondent would attract immediate attention, by returning to El Salvador after having been out of the country for so long, without providing any explanation for this conclusion. I read the RPD's reasoning to be that the mere fact of the Respondent's return to her country after a decade and a half of absence would be noted in her community, and I do not regard this reasoning to be unreasonable.

[23] The Minister is correct in pointing out that the RPD erred in describing the Respondent as having no education. The RPD states that she did not graduate from high school. This is clearly a factual error, as the evidence before the RPD was that the Respondent completed two years of postsecondary education and received a diploma in the area of health studies. However, I cannot

conclude that this factual error alone undermines the reasonableness of the Decision. While it alters the Respondent's profile, such that she cannot be described as uneducated, the RPD's description of her as a woman of significant and particular vulnerabilities was based on several aspects of her profile, including in particular the psychological component. The RPD describes her limited resilience and resourcefulness resulting from the trauma she had experienced in El Salvador, which conclusion was supported by expert psychological evidence that the Minister has not challenged.

[24] With respect to RPD's finding that the Respondent had limited resilience and resourcefulness, the Minister notes that she moved to the US, lived and worked there for 15 years, and then moved to Canada by herself. The Minister submits that these facts make the RPD's finding unreasonable. However, this argument amounts to a request that the Court interfere with the RPD's weighing of the evidence before it, which is not an appropriate role for the Court sitting in judicial review of an administrative decision.

[25] In conclusion, I find that the Minister has raised no basis for the Court to interfere with the RPD's conclusion that, given the Respondent's vulnerable profile and the country conditions in El Salvador, she has established a well-founded fear of persecution. I therefore turn to the Minister's arguments surrounding the RPD's state protection and IFA analysis.

B. *Did the RPD err in finding that state protection was unavailable to the Respondent?*

[26] The Minister notes that the Respondent did not seek protection of the police before leaving El Salvador and submits that the RPD unreasonably found that the Respondent had

rebutted the presumption of state protection. The Minister relies on authorities for the principles that (a) the presumption of the availability of state protection is harder to rebut in a functioning democracy such as El Salvador; (b) an applicant for refugee protection is required to demonstrate that he or she took all objectively reasonable efforts to obtain local protection before seeking refugee production abroad; and (c) a claimant cannot simply rely on his or her own belief that state protection will not be forthcoming without testing it (see *Poczkodi v Canada (Minister of Immigration, Refugees and Citizenship)*, 2017 FC 956 at paras 39-40, and *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 [*Ruszo*] at paras 32-33).

[27] In contrast, the Respondent refers to the decision in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*], where the Supreme Court of Canada noted that it is only in situations in which state protection might reasonably have been forthcoming that a claimant’s failure to approach the state for protection will defeat the refugee claim. To somewhat similar effect, at paragraph 33 of *Ruszo*¸ Chief Justice Crampton’s explanation of the onus upon a claimant, to demonstrate efforts to seek state protection, is qualified as applying in the absence of a compelling or persuasive explanation for failing to do so.

[28] Applying these principles to the reasoning of the RPD in the present case, I find no reviewable error in its state protection analysis. While the RPD made its finding based on the CCD, and the Minister is correct that there was no evidence of efforts by the Respondent to seek state protection, the RPD’s analysis based on the CCD is reasonable. It concluded based on the documentary evidence that security forces in El Salvador are corrupt and unable to offer protection to citizens against criminal groups. It referred in particular to evidence that laws

against rape are not effectively enforced and that there is widespread impunity for aggressors. In my view, the RPD's reasoning falls squarely within the circumstances contemplated by *Ward*.

[29] Moreover, I agree with the logic of the submission by the Respondent's counsel at the hearing of this application, to the effect that, in the particular circumstances of this case, there would have been very limited probative value in efforts made by the Respondent to seek police protection before leaving El Salvador, as that would have been at least 15 years ago. Such efforts would therefore have provided little insight into the availability of state protection under the circumstances that now exist 15 years later.

C. *Did the RPD err in finding that the Respondent does not have a viable IFA?*

[30] The Minister's argument surrounding IFA is, at least in part, similar to the position advanced on state protection, i.e. that it was unreasonable for the RPD to find that there was no viable IFA in El Salvador in the absence of any efforts by the Respondent to move to another part of the country to seek safety. Again, I find compelling the Respondent's submission that such efforts 15 years ago would offer little insight into the viability of an IFA under the circumstances that exist today. Moreover, this Court has held that there is no onus on a claimant to personally test the viability of an IFA before seeking surrogate protection in Canada (see *Alvapillai v Canada (Minister of Citizenship and Immigration)* (1998), 52 FTR 108 at para 3).

[31] The Minister refers to the two-part test applicable to assessment of the viability of an IFA, and principles surrounding the application of that test, and argues that the RPD neither referred to nor applied the test. This test requires that, to find a viable IFA, the RPD must be

satisfied: (a) that there is no serious possibility of the claimant being persecuted in the proposed IFA; and (b) that, in all the circumstances including circumstances particular to the claimant, conditions in the IFA are not such that it would be unreasonable for the claimant to seek refuge there (see *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 at para 11).

[32] In my view, the RPD's reasoning, although very brief, is fully intelligible and, while it does not expressly set out the test, it demonstrates no misunderstanding of the test or failure to apply it. The RPD finds that there is no viable IFA for the Respondent anywhere in El Salvador, because it has found that she would face a serious possibility of being persecuted throughout the country. The possibility of a viable IFA was eliminated under the first part of the applicable test. Moreover, this is a reasonable conclusion based on the RPD's findings as to the conditions faced by women in El Salvador, which are not related to any particular part of the country.

[33] Having found no reviewable error on the part of the RPD, this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-80-18

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

No question is certified for appeal.

"Richard F. Southcott"

Judge

OFEDERAL COURT

SOLICITORS OF RECORD

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