Federal Court  Cour fédérale

Date: 20141203

Docket: IMM-1295-14

Citation: 2014 FC 1158

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, December 3, 2014

Present: The Honourable Mr. Justice Noël

BETWEEN:

BRANDON NAZARETH GARRIDO PALMA
AND
JORGE FLORES LEAL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) of a decision made on February 4, 2014, by Gilles

Crête of the Immigration and Refugee Board of Canada, Refugee Protection Division (RPD) dismissing the applicants' refugee claim under section 96 and subsection 97(1) of the IRPA.

II. The facts

[2] The applicants, Jorge Flores Leal (Jorge), 42 years, and Brandon Nazareth Garrido Palma (Brandon), 23 years, are both Mexican citizens.

[3] Brandon was sexually assaulted by Andres Villalever, director of the home Las Fuentes Pauxim where he was a resident. Mr. Villalever was also his taekwondo instructor. Jorge, the co-applicant, was a caregiver and instructor in this orphanage.

[4] The applicants reported the sexual assaults of Mr. Villalever.

[5] Jorge received death threats from Mr. Villalever in February 2008. Brandon and Jorge both received death threats from this same person in November 2008. The purpose of threatening Brandon was to pressure him so that he would recant by writing to Jorge Huguenin, president of Pauxim foundation, who manages the home, regarding the sexual assaults that he apparently experienced.

[6] Mr. Huguenin then threatened the applicant Jorge on April 10, 2009. He also warned both applicants to leave Mexico if they wanted to live.

[7] On April 13, 2009, Jorge went to the Human Rights Commission of the city of Guadalajara with child victims of sexual assaults by Mr. Villalever, including Brandon, but they were told that it would do no good to file a report regarding the sexual assaults.

[8] The applicants arrived in Canada on April 23, 2009, and claimed refugee protection.

III. Impugned decision

[9] The identity of the applicants is not under dispute.

[10] The RPD made findings on the truthfulness of the allegations advanced by the applicants and on the subjective fear advanced by the applicants.

[11] The RPD also accepted the expert report of Dr. Pelletier dated April 2013 and the psychologist's report dated April 9, 2013. However, the RPD is of the view that the applicants did not provide information that they allegedly did not have access in Mexico to the same care relating to their physical and emotional well-being.

[12] The RPD then assessed the applicants' Internal Flight Alternative (IFA) and the profile of the applicants' agents of persecution.

[13] The applicants explained to the RPD that they have not received threats since they arrived in Canada on April 23, 2009, and that they did not know whether their persecutors knew that they were in Canada.

[14] The RPD questioned Jorge as to whether he had received threats when he lived in Hidalgo, between February 2008 and April 2009, where he has family. He replied no, supposing that his persecutors did not know where he was. Brandon also resided for some time in Hidalgo from January 2009 to April 2009, where he did not work and only lived with Jorge's parents. Jorge also stated that his family had not heard of Mr. Villalever or Mr. Huguenin since the arrival of the applicants in Canada.

[15] In response to the question posed to Jorge by his counsel as to why he did not stay in Hidalgo, Jorge answered that the reason was that he was sick and that he was causing a risk for his family, because his persecutors could contact him at any time. He added that he was staying hidden and was having his anxiety treated. The RPD did not believe that Jorge was staying hidden given that he travelled regularly between his residence and his workplace.

[16] The RPD questioned the applicants as to why they could not establish themselves in Hidalgo or in other cities in Mexico, such as Monterrey and Santiago de Querétaro. The applicants answered that these cities were still in Mexico and their persecutors allegedly had ways to find them.

[17] After examining the IFA, the RPD is of the view that the applicants did not receive threats from the persecutors when they were in Hidalgo and they did not show that their situation would be different if they moved to other cities, such as Pachuca, Santiago de Querétaro or even Monterrey. The RPD added that even today, Jorge's family has not received threats from the persecutors.

[18] In considering the documentary evidence submitted, the RPD was of the view that the interest of the persecutors in wanting to initiate contact with the applicants is close to nil. Further, although the persecutors have the means, the applicants have not established that they indeed could have had access to their social insurance numbers or any other documentation that could track them in the entire State of Mexico.

[19] Therefore, the RPD found that the applicants did not meet their burden of proving that there was more than a mere possibility that the persecutors continue to seek revenge on the applicants, as they allege.

[20] The RPD found that an IFA exists for the applicants in the cities noted above. The applicants did not show that they would be persecuted by the persecutors there. The applicants also did not show that, on a balance of probabilities, a threat to their lives or a risk of cruel and unusual treatment or punishment exists in one of the previously-noted cities. The RPD was of the view that it is not objectively unreasonable for the applicants to seek refuge in one of these cities.

[21] Given the IFA, the applicants are therefore not "Convention refugees" or "persons in need of protection", under section 96 and subsection 97(1) of the IRPA.

IV. Parties' submissions

[22] The applicants first advanced that they never mentioned the city of Savon in their testimony, particularly when Jorge discussed his stay in Hidalgo and his travel between his

residence and his workplace. From this error flowed other errors regarding the IFA assessment. The respondent answered that this error does not invalidate the RPD's reasoning.

[23] The applicants also alleged that the RPD voluntarily neglected to provide adequate reasons for its refusal to consider their argument that it is unduly harsh to consider the IFA given that they are considered to be vulnerable persons and by considering the medical report and the psychologist's report submitted. The respondent replied that, contrary to what the applicants alleged, the RPD provided reasons for its refusal to accept this argument at paragraphs 35 and 36 of its decision.

[24] The applicants also argued that the RPD indirectly considered the issue of State protection in its decision, although it had excluded this protection during oral arguments at the hearing. The applicants alleged that this is a violation of the theory of legitimate expectations as a principle of natural justice. The respondent replied that these claims must be rejected because the RPD had not addressed this protection and that it was right not to assess the issue of State protection insofar as an IFA is sufficient to consider the applicants' application.

[25] The respondent also advanced that the applicants did not show that a serious possibility of persecution exists in Mexico because they have an IFA, which is sufficient to reject a refugee claim. The respondent explained that the RPD correctly applied the following two-part test that aims to determine whether an IFA exists:

1. The circumstances in the part of the country where the applicant could have taken refuge are safe enough to enable the applicants "to enjoy the basic and fundamental human rights"; and

2. The situation in this part of the country must be such that it would not be unreasonable for the applicant, considering all the circumstances, to seek refuge there.

[26] With respect to the first part, the respondent alleged that the RPD reasonably found that the applicants had not shown, among other things, that they would face a serious possibility of persecution in the cities suggested and because the applicants have not received any threats since they arrived in Canada. Thus, it is improbable that the persecutors are hunting the applicants in faraway locations. The applicants have also not shown that the persecutors could track them anywhere in Mexico.

[27] As for the second part of the test, the respondent explained that the applicants did not show that it would be objectively unreasonable to use their IFA, particularly because the applicant Jorge had worked and lived in several places across Mexico and on numerous occasions between 1998 and 2009.

[28] According to the respondent, the applicants' claims only serve to criticize the reasons for the RPD's decision and, therefore, they do not show that the RPD's decision is unreasonable.

V. Supplementary reply and memorandum of the applicants

[29] The applicants submitted a reply to the respondent's first memorandum. The applicants argued here that the respondent, in his memorandum, does not respond on merit to the arguments raised by the applicants in their memorandum. The applicants also repeat the arguments raised in their written submissions (sometimes recopying word-for-word certain passages of their memorandum: paragraphs 12, 14, 17, 19, 20, 43, 45 and 53 of the reply are, in whole or in part,

paragraphs 22, 23, 24, 25, 29 49, 50 and 67 of the applicants' memorandum. Paragraphs 46 to 52 of the reply are an exact copy of paragraphs 51 to 56 of the applicants' memorandum).

[30] The applicants submitted a supplementary memorandum, with the objective of [TRANSLATION] "specifying a number of errors committed by the RPD in its evaluation of the IFA when it had agreed at paragraph 12 (of its decision) that the co-applicants were credible" (applicants' supplementary memorandum at para 1). The applicants repeated essentially the same arguments as those found in their memorandum. They simply made a few clarifications on some evidence presented to the RPD. They alleged that this evidence was not considered or noted by the RPD in its analysis.

VI. Issues

[31] The co-applicants presented no issues. They alleged only that there were factual errors regarding the determination of the reasonableness of the IFA and errors of law in the assessment of the characterisation of the applicants as vulnerable persons, in the medical report and the psychologist's report.

[32] The respondent proposes the following question: did the RPD commit a reviewable error in finding that the applicants have an IFA in Mexico?

[33] After reviewing the parties' submissions, the errors alleged by the co-applicants and the issue submitted by the respondent, I am of the view that the respondent's question as worded is the appropriate question in this case.

VII. Standard of review

[34] The question of whether the RPD erred in its analysis of the applicants' IFA is a question of mixed fact and law. Therefore, the applicable standard of review is that of reasonableness (*Zamora Huerta v Canada (Citizenship and Immigration)*, 2008 FC 586, [2008] FCJ No 737 at paras 14-15). Therefore, this Court will intervene only if the decision is unreasonable, either that it falls outside of the "range of possible, acceptable outcomes which are defensible in respect to the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

VIII. Preliminary remarks

[35] As submitted by the respondent in his original memorandum, the applicants' memorandum is flawed with respect to the form and length of the memorandums, thereby breaching section 65 of the *Federal Courts Rules*, SOR/98-106 (Rules). The applicants' memorandum is also lengthy, breaching section 70 of the Rules.

[36] I also agree with the respondent, in his supplementary memorandum, that the applicants' affidavits contain several legal arguments. Therefore, the affidavits should be disregarded, because they must be limited to the facts of which the affiant has personal knowledge (subsection 81(1) of the Rules). If a motion had been presented raising these two types of irregularities, it would most likely have been positively received and the co-applicants would have been asked to comply with the Rules.

IX. Analysis

[37] The RPD reasonably found that the applicants had an IFA and thus that they are not refugees under section 96 or persons in need of protection under subsection 97(1) of the IRPA. As it appears from the decision, the RPD pointed out that it does not question the credibility of the applicants or the threatening e-mails that Brandon received or State protection (Tribunal Record (TR) at page 390). It was only the IFA that was called into question and analyzed in its decision. For this reason, although the RPD did not explicitly specify the test to be applied with respect to the IFA, its analysis is adequate.

[38] The test to determine the IFA contains two parts:

1. The circumstances in the part of the country where the applicant could have taken refuge are safe enough to enable the applicants to enjoy the basic and fundamental human rights; and
2. The situation in this part of the country must be such that it would not be unreasonable for the applicant, considering all the circumstances, to seek refuge there (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, [1991] FCJ No 1256 at paras 6 to 9).

[39] In this case, as the respondent demonstrated, with respect to the first part of the test, the applicants did not show that they would face a serious possibility of persecution in the cities suggested and analyzed during the hearing, in particular because the applicants had not received any threats since their arrival in Canada, because Jorge's family in Hidalgo have had no contact with the persecutors since the applicants have been in Canada, because they lived in Hidalgo for several months without contact with their persecutors and because Jorge was able to work in Hidalgo without the persecutors knowing where he was. Therefore, the applicants have not

shown that the persecutors could track them everywhere in Mexico or that the locations where they could find refuge within Mexico would not be safe.

[40] Furthermore, the applicants' agreed statement attached to the Personal Information Form (PIF) (at pages 27 to 34 of the original PIF and at pages 155 to 164 of the corrected version of the PIF included in the TR) noted that a person named Mr. Raymundo supported and helped the applicant Jorge during several appearances at the Office of the Attorney General of the State of Jalisco regarding the sexual assaults of Mr. Villalever (TR at pages 28-29 of the original PIF and at pages 156-157 of the corrected PIF). Other children are said to have also made complaints against Mr. Villalever (TR at page 29 of the original PIF and at page 157 of the corrected PIF). However, nothing was said as to whether they were threatened in any way whatsoever or whether their lives were put in danger after reporting the sexual assaults by Mr. Villalever. The corrected version of the PIF only mentions that one of the children that allegedly made a complaint of sexual assaults, Francisco Ortiz, was kicked out of the home for disruptive behaviour and that all the documents concerning his reports, his passport, his visas and certificates disappeared (TR page 159 at para 31). In addition, I note the RPD's comments regarding the agents of persecution. The findings are obvious and tend to show that although they are wealthy and supported, they do not have the stature of criminal agent of persecution.

[41] Therefore, the applicants have not fulfilled the first part of the test.

[42] As for the second part, the applicants alleged that the RPD did not take into account the psychologist's report submitted in support of the argument that, in this case, it is appropriate to

set aside the IFA given the irreparable scars and trauma of the applicants because of their experience with the persecutors in Mexico. Specifically, the applicants claimed that the RPD refused to provide reasons, in its written decision at paragraphs 35 to 37, for its refusal to follow the legal reasoning of counsel for the applicants on this matter. I do not agree with this argument.

[43] In this case, the RPD's decision specified that the RPD took into account the psychologist's report in its assessment and considered it to be credible. Indeed, paragraph 13 of this same decision includes a detailed analysis of Dr. Pelletier's expert report and the psychologist's report, where the RPD accepts the psychologist's diagnoses, but explained that she cannot attest to the facts relating to the death threats alleged by the applicants or that their lives are in danger in Mexico. In response to the psychologist's statement that a return to Mexico would compromise the mental health of the applicants, the RPD explains that there is no information that the applicants cannot have access to the same treatment that they have received in Canada. In this case, Jorge himself explained during the hearing that when he was in Hidalgo, he was treated by a psychologist (TR at page 359). Further, during the submissions of counsel for the applicants at the hearing, in response to the question asked by the RPD as to whether the applicants could be treated in Mexico for their mental health problems, counsel for the applicants replied yes (TR at page 396). Therefore, the applicants did not demonstrate that it would be objectively unreasonable to avail themselves of their IFA. The co-applicants would like it if the conclusions in the reports were sufficient to determine that there is no possible IFA to consider. I cannot accept this argument. Although the medical and psychological findings are important, it is up to the RPD's discretion to assess the situation. It did so, noting that medical and psychological services were available in Mexico and they will be in the future.

[44] Finally, although the RPD made an error in referring to the city of Savon, which was not presented by the applicants during the hearing, but was noted in the RPD's decision at paragraph 24, this error is not determinative. After reviewing the transcript of the hearing, it refers to the city of "Sudalo" in Sahagun, Hidalgo. The city of "Sudalo" is not noted in the RPD's decision, but it was referred to by the applicant Jorge during the hearing in connection with his travel between his workplace and his residence (TR at page 358). Paragraph 24 in connection with the start of paragraph 25 of the decision relates directly to the issue of Jorge's travel between his residence and workplace. The names Savon and "Sudalo" have a certain appearance, which is very likely where the confusion comes from. Therefore, this error is not significant in the circumstances and I do not accept this argument.

X. Conclusion

[45] The RPD's decision is reasonable. The RPD analyzed well the IFA and nothing justifies the intervention of this Court. Thus, the RPD's decision falls within the range of possible, acceptable outcomes which are defensible in respect to the facts and law. Therefore, the decision must be upheld.

[46] The parties were invited to present questions for certification, but no question was proposed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed. No question is certified.

"Simon Noël"

Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Alain Joffe	FOR THE APPLICANTS
Thi My Dung Tran	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Alain Joffe Montréal, Quebec	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT