Federal Court  Cour fédérale

Date: 20160614

Docket: IMM-5057-15

Citation: 2016 FC 665

Ottawa, Ontario, June 14, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

YINGHAO LEI
YANYUN ZHEN
ZHIBIAO LEI (A MINOR)
AMY LEI ZHEN (A MINOR)
(A.K.A. AMY ZHEN LEI)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants challenge the decision of the Refugee Appeal Division of the Immigration and Refugee Board (RAD) dated October 14, 2015. The RAD upheld the decision of the Refugee Protection Division (RPD) which rejected the claim for refugee protection made pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] The applicants in this case are the family of Yinghao Lei constituted of his wife, his son and his daughter.

I. Facts

[3] The principal applicant and wife are Chinese citizens; they are also permanent residents of Honduras. Their son was born in China in 2002 and is a Chinese citizen. As for their daughter, born in 2011, she is a citizen of Honduras. The principal applicant has been in Honduras since 2005; he became permanent resident of that country in 2006. Two years later, in 2008, he opened a restaurant in Tegucigalpa and he sponsored his wife and son in 2009.

[4] The restaurant held by the principal applicant would have been robbed by three armed assailants in September 2010. There was no contact with the police because the principal applicant believed it would be futile and because there was some fear of reprisals.

[5] In effect, the allegations that give rise to the proceedings in Canada start in April 2014. The principal applicant would have received an extortion demand from a member of a group called "Gang 18". The original demand for 100,000 lempira was settled initially with paying 500 lempira, or 0.5% of the original demand. However, it seems that the demands did not stop and, in May 2014, the principal applicant would have attended the police station for the purpose of filing a brief report. When he returned to the station once week later, seeking to find if the investigation had made any progress, no officer would apparently accept to speak to him. More phone calls were made which would have forced the applicants to pay additional money to Gang 18.

[6] However, according to the basis of claim form submitted by the principal applicant in January 2015, the money paid would have been rather minimal. It would appear that the amount of 500 lempira is an amount "to load to his phone number just for the purpose to stop his phone call" (paragraph 5). Then, one can read about the payments made in May 2014 at paragraph 6, the principal applicant indicating that "[d]uring the time, the person kept calling, I had no choice but paid another two times for his phone."

[7] That seems to be the extent of the harassment suffered by the principal applicant. Understandably, he and his wife were worried but the threats were not of the most extreme variety.

[8] The family left Honduras in July 2014 to visit parents in China. Arrangements were made for a smuggler to bring the family out of China to North America.

[9] The episode involving the smuggler is shrouded in mystery. The applicants did not want to go back to Honduras given the threats that they had received, but they did not want to stay in China because of the limited number of children policy enforced by the authorities. However, it is less than clear who the smuggler was and what role he was to play. Thus, the principal applicant stated that following discussion with his family in China, "my parents helped me contact a smuggler. The smuggler suggested us to use our US visa to go to Canada through USA" (paragraph 8).

[10] Evidently, US visas had been obtained, but we do not know why the choice was made to have visas for the United States when the purpose is to end up in Canada. It does not appear that the applicants sought asylum in the United States. Be that as it may, the family travelled to the United States on August 18, 2014; for a period of four months, it appears that the applicants stayed in the United States as the record would show that they arrived in Canada on December 29, 2014.

II. Decision Under Review

[11] The RPD dismissed the claims on July 19, 2015. There were two separate findings grounding the decision: (1) The applicants' claim properly concerned only Honduras where their fear of persecution was not credible; and (2) There was no nexus between the applicants' fear in Honduras and a Convention ground or personalized risk in that country.

[12] These are the two findings that were supported by the RAD as it upheld the decision of the RPD.

III. Issues

[13] The only questions before this Court are whether or not the decision of the RAD to uphold the decision of the RPD on the two issues raised are reasonable.

[14] As I pointed out during the hearing of this case, simply putting the matter as if it suffices that an error on the part of the RAD suffices to make a judicial review successful is in my view

not adequate. Hence, simply stating that the issue is that the RAD erred by impugning the applicants' credibility falls short of the mark. The very nature of judicial review implies that there may be more than one reasonable outcome. A disagreement on whether the credibility of applicants has been impugned does not make the outcome unreasonable. As the Supreme Court stated in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 (*NL Nurses)*:

> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

Accordingly, if this Court were to conclude the administrative tribunal has erred because it would have come to a different conclusion, that does not constitute automatically a reason sufficient to quash a decision. Indeed, the Court in *NL Nurses* cautioned reviewing courts not to designate omissions as errors that are fateful:

> [17] The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

[15] That is obviously not to say that every error must be swept under the rug. However, not every so-called "error" dooms an administrative tribunal's decision. The real test, in my view, continues to be whether the decision was reasonable or not. The test for reasonableness continues

to be that which is found at paragraph 47 of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. Reasonableness is concerned with process as well as the decision itself. However, to the extent that the decision falls within the range of possible, acceptable outcomes defensible in respect of the facts and law, the decision will be considered to be reasonable. As for the process, the Court speaks of "the existence of justification, transparency and intelligibility within the decision-making process."

[16] In the case at bar, it is in my view more appropriate to frame the issue as whether impugning the applicants' credibility is reasonable and whether the finding that there is no nexus between the applicants' fear and a Convention ground is reasonable.

IV. Arguments and Analysis

[17] The parties agreed that the standard of review is that of reasonableness. The Court shares that view (*Huruglica v Canada (Citizenship and Immigration)*, 2016 FCA 93 at para 35). The applicants took issue with the view taken by the RAD of the credibility of the claim that is made in this case. Fundamentally, the applicants, in my view, are critical of the fact that the RAD did not include in its assessment some nuances that came from the principal applicant's evidence.

[18] The RAD was considering the challenge made by the applicants to one of the credibility findings made by the RPD. This was the finding relating to the length of the stay of the appellants in the United States where they chose not to seek asylum. The RAD had some difficulty understanding the story told by the principal applicant. As I have already noted, the episode involving the smuggler remained rather cloudy. That, as I read the three paragraphs in

the decision dealing with that episode, appears to also have been the concern of the RAD. The explanation for not seeking asylum in the United States where they stayed for four months was not credible. Saying that it was because the applicants did not know anyone in the United States does not address the fact that they did not know anyone in Canada either. The existence of visitors' visas for the United States is also troublesome. As noted, the person who fears for their safety and already has legal status in a safe country would be expected to seek protection in that country. That begs the question: why obtain visas for the United States to then stay in the United States for four months before coming to Canada? When asked about why wait to come to Canada instead of claiming in the United States, the principal applicant's testimony is to the effect that he had spent $5,000 and he did not know anyone in the United States. Indeed, when asked why, as holders of valid US visas, he would pay someone to smuggle them into Canada, the principal applicant could not give a reason. Indicating that he did not know how to come here would not be conducive to enhancing credibility.

[19] As can be seen, the credibility concern was broader than simply not seeking asylum in the United States. It is rather the whole episode that was troubling.

[20] The applicants claim that they provided a credible and logical explanation for the actions in the United States. What is that credible explanation? The answer is that the applicants were at the smuggler's mercy. That explanation, in my view, does not make the findings of the RAD unreasonable. Actually, I would have found the explanation to be itself unreasonable. Why the applicants would be at the mercy of smugglers in the United States is left unexplained on this record. The so-called error does not, in my view, displace the reasonableness of the decision of

the RAD. There may be a disagreement as to the weight to be given to the further explanation that the applicants were at the smuggler's mercy, but what is more important is that the RAD's finding has not been shown to be outside of the acceptable, possible outcomes on this record.

[21] However, the more important issue in this case is the applicants' contention that there is a nexus between their fear and Convention grounds.

[22] The applicants argue before this Court that they were targeted in Honduras because of their ethnicity. The difficulty with that contention is that it is reasonable to conclude that it is not supported by the evidence of the principal applicant. In the applicants' argument they claim that wealthy Chinese business owners are specifically targeted.

[23] As counsel for the respondent said at the hearing of this case, the final answer given by the principal applicant before the RPD was the worst possible answer he could have given. At the end of the examination of the principal applicant, the following exchange took place:

> **Counsel**: So you said there is a lot of crime in Honduras. This gang – the gang 18, do they target native Hondurans, all the businesses?
>
> **Applicant**: No. They are specially targeting Chinese. Rich Chinese people.
>
> **Counsel**: Those are all my questions.

[24] Evidently, counsel was satisfied with the answer he received. But the answer was somewhat ambiguous. That prompted the RPD panel to ask the following question and receive the answer:

> **Board Member:** Just to be clear, so the gang 18 leaves rich people who aren't Chinese alone and only focuses on Chinese is that your testimony? The gang 18 leaves rich people who aren't Chinese alone and focuses only on Chinese is that your testimony?
>
> **Applicant**: No. As long as you are a businessman you become their target.

[25] It appears to me that it was open to the RAD to conclude, as did the RPD, that the principal applicant volunteered that it is the fact that you are wealthy that would make you a target. The applicants tried to argue that the RAD had to explain the difference between an earlier answer and the final answer given by the principal applicant. In my view, there was no such requirement.

[26] When seeking a clarification as to what was meant by the principal applicant, the RPD received an answer that was complete that was the final word as expressed by the principal applicant himself. That in itself supports the conclusion of the RAD that "[t]his simple piece of testimony is determinative on the issue of nexus" (paragraph 20 of the RAD decision). That finding is reasonable on its face given the exchange that took place before the RPD.

[27] That also disposes of the issue around the generalized risk. As is well known, section 97 of the IRPA requires a personal risk and not one that is generalized. The existence of a personalized risk is itself dispelled by the notion of generalized criminality targeting all businessmen.

[28] As a result, the application for judicial review must be dismissed. The parties agreed that there is no serious issue of general importance that requires that a question be certified. That is a point of view that I share.

JUDGMENT

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

No question is certified.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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