Federal Court  Cour fédérale

Date: 20171228

Docket: IMM-2956-17

Citation: 2017 FC 1194

Ottawa, Ontario, December 28, 2017

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ROBERTO AGUIRRE CARDENAS
LAURA PALMA MARTELL
MAYLEN AGUIRRE PALMA (A MINOR)
AXEL ROBERTO AGUIRRE PALMA (A MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants ask the Court to set aside a decision of the Refugee Appeal Division [RAD] that denied their claim for refugee protection having found that they had an Internal Flight Alternative [IFA] in Acapulco, Mexico. For the reasons that follow, their application is dismissed.

Background

[2] The Applicants are a family of four: Roberto Aguirre Cardens, his wife Laura Palma Martell, and their two minor children, Maylen Aguirre Palma and Axel Roberto Aguirre Palma. They are all citizens of Mexico. The Applicants testified before the Refugee Protection Division [RPD] that they have a well-founded fear of persecution at the hands of the criminal gang known as La Banda de la Muneca [Muneca] due to Muneca's threats and attempts to kidnap them. The RPD found the Applicants were not credible and thus had not established a well-founded fear of persecution. They appealed this decision to the RAD and it upheld the RPD's ruling, but on the basis that the Applicants had an IFA in Acapulco, Mexico.

[3] The RAD raised the issue of an IFA and, as it had not been previously raised by the RPD, it alerted the Applicants to its concern and asked them to provide submissions on the proposed IFA of Acapulco. The RAD noted that under subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, applicants may only present evidence to the RAD that was not reasonably available, or that they could not reasonably have been expected to have presented, at the time of the RPD's determination. Because the IFA issue was not raised by the RPD, the RAD accepted evidence that pre-dated the RPD decision, including numerous news articles, as both relevant and credible evidence.

[4] The RAD stated it was guided by the two-prong test for determining if there is a suitable IFA set out by the Federal Court of Appeal in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 1256; [1992] 1 FC 706. The Court of Appeal explained that first prong is whether a claimant faces a serious possibility of persecution in the IFA. The

second prong is whether it would not be unreasonable, in all the circumstances, for a claimant to seek refuge there.

[5] After an IFA is proposed the onus is on the claimant to show that the proposed IFA fails to meet one or both prongs of the test.

[6] Acapulco, Mexico, is a city with a population of about one million people located approximately 1,600 kilometers away from Chihuahua, the Applicant's home. The RAD found that Acapulco was easily reachable by air, road, and sea. The RAD found there was no evidence of Muneca operating in Acapulco, nor evidence that the Muneca would seek them out in Acapulco.

[7] The RAD noted that like most Mexican cities, Acapulco has suffered from gang violence over the past decade. It further acknowledged that the city has a reputation as the most violent city in Mexico due to the struggle between two drug cartels. The RAD found there was no nexus between Convention grounds and the generalized risk the Applicants may face in Acapulco.

[8] The RAD also examined the school system there and the possibility of employment in the tourism industry for the adult Applicants.

[9] The RAD concluded that the Applicants failed to establish that the proposed IFA was not viable, and thus upheld the RPDs decision but for different reasons.

Issues

[10] The Applicants submit that there are two reviewable errors in the RAD decision. First, they assert that the RAD raised a new issue, namely whether their fears had a nexus to a Convention ground, and second, they assert that the decision that Acapulco is an IFA is not reasonable in the circumstances.

Analysis

[11] The RAD at paragraph 41 of its decision stated: "As there is no nexus in this case to the Convention, the claim/appeal is being reviewed under section 97 of the IRPA." The Applicants complain that they were never put on notice that the RAD might view their claim as other than a claim for refugee protection under section 96 of the Act. In my view, this submission is without merit.

[12] First, the RPD decision clearly states that the applicants "seek refugee protection against Mexico pursuant to sections 96 and 97 of the Immigration and Refugee Protection Act." No decision was reached by the RPD as to which section their claim fell under as they were found not to be credible. Accordingly, the basis of their claim for protection was an open question.

[13] Second, the Federal Court of Appeal in *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 93 at paragraph 78 has described the role of the RAD on an appeal:

> …the role of the RAD is to intervene when the RPD is wrong in law, in fact or in fact and law. This translates into an application of the correctness standard of review. If there is an error, the RAD

> can still confirm the decision of the RPD on another basis. It can also set it aside, substituting its own determination of the claim, unless it is satisfied that it cannot do either without hearing the evidence presented to the RPD…

[14] Every claim for protection raises both the possibility of protection as a refugee on Convention grounds, and the possibility of surrogate protection under section 97. The issue of which, if either provision, applies to a claimant is always an issue both before the RPD and the RAD. That is especially the case where, as here, there has been no determination made on the claim as it has been dismissed based on credibility.

[15] Third, even if I had been inclined to see this as the raising of a new issue requiring that the RAD alert the Applicants, its failure to do so had no impact on the ultimate decision. Regardless of whether a claim is under section 96 or section 97, it cannot succeed if there is an IFA available to the claimant. In this case, such an IFA was found. As a consequence, whether the claim was seen as falling under section 96 or under section 97, it could not succeed.

[16] The Applicants submitted in oral argument that the RAD, having viewed this as a claim under section 97, approached the IFA with an eye as to whether the risk to the Applicants was generalized or personal. They submit that had they been put on notice that nexus was an issue, they would have been able to provide submissions that would have influenced the RAD such that it would not have focused on generalized risk in Acapulco. In my view, this submission is misguided as the RAD's analysis of the risk to these Applicants in Acapulco was both reasonable and in keeping with this Court's jurisprudence.

[17] The first element of an IFA analysis must be whether the risk alleged by a claimant is negated in the proposed IFA. Where the agent of persecution operates country-wide, or is the state itself, it is unlikely that there will be any part of the country where the risk is negated. Here, the agent of persecution was the Muneca. The RAD found that it operated only in the area where the Applicants were living, and importantly found that it did not operate in Acapulco. It further found that the group would not seek out the Applicants in Acapulco. Those findings were not challenged by the Applicants. Accordingly the first element of an IFA was established.

[18] The second element of an IFA is whether it would have been unreasonable for a claimant to relocate to the proposed IFA. This analysis requires a decision maker to look at a number of possible factors that may be raised by a claimant. The factors examined below constitute the most common factors but this is not a closed list.

[19] The first factor that must be considered, if raised, is whether or not the IFA is accessible to the claimant. The claimant must be able to travel to the IFA safely and be able to lawfully reside there. This requirement was noted by Justice Linden in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 [*Thirunavukkarasu*] at paragraph 14:

> An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. Essentially, this means that the alternative place of safety must be realistically accessible to the claimant. Any barriers to getting there should be reasonably surmountable. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there. For example, claimants should not be required to cross battle lines where fighting is going on at great risk to their lives in order to reach a place of safety.

[20] A second factor to be considered, if raised, is whether the proposed IFA is a place where the claimant would be isolated or unable to participate in the social or cultural activities, as are other citizens. This was also noted by Justice Linden in *Thirunavukkarasu* at paragraph 14:

> Similarly, claimants should not be compelled to hide out in an isolated region of their country, like a cave in the mountains, or in a desert or a jungle, if those are the only areas of internal safety available.

[21] A third factor that must be considered, if raised, is whether there is any particular characteristic of the claimant that makes it unreasonable to expect him or her to relocate to the proposed IFA. For example, if a claimant has a medical condition requiring regular treatment and assistance, it would be unreasonable to expect that claimant to relocate to an area where such medical assistance is unavailable. Similarly, where children are involved, the absence of schools might weigh into the reasonableness of the IFA.

[22] A fourth factor, which if raised, that may affect the reasonableness of the IFA is whether the proposed IFA may subject the claimant to persecution of a different sort than he or she experienced in the area from which the claimant fled. For example, a claimant who has a well-founded fear of persecution in the area where he lives because of his political activities against the local mayor would not be reasonably expected to move to an area of the country where homosexuals are persecuted, if the claimant is himself a homosexual. In the vernacular, it is unreasonable to expect a claimant to escape the frying pan by jumping into the fire. In this scenario, not only is the proposed IFA not appropriate because it will subject the claimant to a new risk, it may also be inappropriate because the persecution he will experience may force him to move back to the original area from which he sought refuge.

[23] As noted above, Justice Linden in *Thirunavukkarasu* at paragraph 14, took the view that when considering whether a location is an IFA, a claimant cannot be required "to encounter great physical danger or to undergo hardship … in staying there" [emphasis added]. Fundamentally, the Applicants submission to the RAD was that Acapulco is not a reasonable IFA because of the violence and the risks they would face in living there.

[24] I agree with the Respondent that the RAD did examine the issue of whether Acapulco was an unreasonable IFA for these Applicants due to the violence in that city. Specifically at paragraph 27, the RAD noted that it was "the most violent city in Mexico" of late, but also observed that the reason for this was the struggle between two drug cartels for control of that illicit trade. At paragraph 46, it noted that the murder rate affects only 0.1% of the population of the city "with the majority of the victims being rival gangsters or police." Because these Applicants do not fit that profile, it reasonably found that "there is less than a mere possibility that, in a city of between 500,000 and 1,000,000 people … these Appellants would become victims of the drug cartel."

[25] The Applicants submit that their situation in particular, in terms of their experiences that led them to seek refuge, make Acapulco an unreasonable place to seek protection. Specifically, they note that Acapulco has been "plagued with kidnappings – many of which end in the death of the victims" and they note that this "is very significant given that the agents of persecution have threatened to kidnap the minor Applicants." Having found that these agents do not operate in Acapulco, the fear of being kidnaped there is, as the RAD found, a generalized risk.

[26] I generally agree that one must undertake a different IFA analysis for someone who is persecuted based on characteristics (such as sexual orientation) and is asked to relocate to a place where violence and kidnapping is rampant, and someone who has experienced the exact type of violence that is prevalent in the location they are being asked to move to. However, as Justice Linden observed, the relevant consideration as to the appropriateness of the IFA in that latter circumstance is whether the claimant is being "required to encounter great physical danger or to undergo undue hardship … in staying there [emphasis added]." In light of the RAD's finding that there was no more than a mere possibility these Applicants would personally experience these risks, the proposed location cannot be said to be an unreasonable IFA, even given the history of these particular Applicants.

[27] I agree with the Respondent that the discussion of the RAD concerning the violent state of affairs in Acapulco and the concerns the Applicants have regarding their employment and risks to the children are all generalized risks. All things being equal, it is not surprising that the Applicants would choose not to relate to Acapulco; however, generalized risk does not amount to persecution and the concerns these Applicants raise do not establish that it is not an IFA for them. Justice Linden concluded his analysis of an IFA at paragraph 14 of *Thirunavukkarasu* with this observation:

> … neither is it enough for refugee claimants to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there. If it is objectively reasonable in these latter cases to live in these places, without fear of persecution, then IFA exists and the claimant is not a refugee.

There is no challenge to the finding of the RAD that these Applicants face no more than a generalized risk in Acapulco – they do not face a fear of persecution.

[28] Accordingly, for these reasons, the finding of the RAD that it was an IFA and that they did not require the protection of another nation, was reasonable and cannot be upset.

[29] No question for certification was proposed.

JUDGMENT in IMM-2956-17

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

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Michael Korman	FOR THE APPLICANTS
Stephen Jarvis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Otis & Korman Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Department of Justice Canada Toronto, Ontario	FOR THE RESPONDENT