Federal Court  Cour fédérale

Date: 20191106

Docket: IMM-5574-18

Citation: 2019 FC 1391

Ottawa, Ontario, November 6, 2019

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

ORLIN RAFAEL RIVERA BALDERRAMOS, SINIA COELLO CASTEJON, JOSUE RIVERA COELLO, SUSAN RIVERA COELLO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Orlin Rafael Rivera Balderramos [Mr. Balderramos], his spouse, Sinia Coello Castejon [Ms. Castejon] and two of their children [collectively referred to as "the Applicants"] seek judicial review, pursuant to section 112 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*], from the October 12, 2018 decision of a Pre-Removal Risk Assessment [PRRA] Officer. The Officer concluded the Applicants would not be subject to a risk of persecution, risk of torture, risk to life or risk of cruel and unusual treatment or punishment,

pursuant to sections 96 and 97 of the *Act*, if returned to Honduras. The Officer concluded there exists a viable Internal Flight Alternative [IFA] in La Paz or La Esperanza, Honduras. For the reasons set out below, I allow the application for judicial review, set aside the decision of October 12, 2018 and refer the matter back to a different PRRA Officer for re-determination.

II. Factual Background and Decisions under Review

[2] Mr. Balderramos is a 38 year-old citizen of Honduras. Ms. Castejon and two (2) of their children are also citizens of Honduras. The couple has two (2) other children in Canada who are not party to this judicial review, one being a citizen of the United States of America and the other a Canadian citizen.

[3] Mr. Balderramos is a bus driver by training and vocation. However, from 2007 to 2014 he was employed as a commercial sailor on cruise ships. The record shows that participation in either of those vocations makes one vulnerable to attacks or extortion from those seeking money. Those who work on cruise ships are viewed as having more money than many others in Honduras. Those working on buses have regular access to substantial cash each day.

[4] Mr. Balderramos stopped working on cruise ships in April 2014 because of an incident in which his spouse, Ms. Castejon, was attacked and nearly kidnapped. In August 2014, while driving a bus in San Pedro Sula, Honduras, Mr. Balderramos was the victim of a robbery and extortion by four (4) Mara Salvatrucha-18 [MS-18] gang members. The assailants informed Mr. Balderramos, under threat of death, that he must provide them with cash on a monthly basis. One of the gang members, El Chiqui, has been known to Mr. Balderramos since childhood. Mr.

Balderramos reported the matter to the police, who, according to him, did nothing. The following day he quit his job and shortly thereafter travelled to the United States of America to be with Ms. Castejon who was visiting in that country. Mr. Balderramos and Ms. Castejon remained in the United States for over two (2) years, where one of their children was born.

[5] On February 21, 2017, the family entered Canada. That same day, they made a claim for asylum pursuant to section 96 and subsection 97(1) of the *Act*. Although the RPD found Mr. Balderramos to be credible, it concluded the Applicants were not convention refugees and dismissed their claim for asylum. With respect to its s. 96 analysis, the RPD concluded that fear based upon criminality does not constitute a fear of persecution based on a *Convention* ground. Under its s. 97 analysis, the RPD observed that Honduras "suffers under very high levels of crime and violence". Nonetheless, the RPD observed that in order for a s. 97 claim to be successful, there must be a personalized risk faced by the Applicants. The RPD found that Mr. Balderramos' and Ms. Castejon's fear of violence in Honduras flows from a generalized risk and not a personalized one. Nonetheless, the RPD went on to conclude, as noted in paragraph 1 above, that the Applicants benefit from an IFA in La Paz or La Esperanza. The RPD concluded the Applicants would not encounter gang members who know them in those cities, and that there was insufficient evidence to establish that El Chiqui or MS-18 would "exert the effort to locate the claimants throughout a country of over eight million people, when they can simply extort the driver who replaced the principal Applicant".

[6] The Applicants filed a PRRA application on July 31, 2018. As part of their application, they submitted 15 support letters, country condition documents, a police report and a sworn

declaration, all of which were considered by the Officer. The Officer appears to accept that Ms. Castejon's brother was kidnapped in July 2018, after the RPD decision. During that kidnapping the brother was, according to the Officer, asked about the Applicants' whereabouts. The Officer also appears to accept that Ms. Castejon's mother was approached by a "gang member" and asked about the Applicants' whereabouts. Again, this incident was, according to the Officer, after the RPD decision. Finally, in July 2018, Mr. Balderramos' 16 year-old daughter who remains in Honduras was the victim of an assault and attempted kidnapping. After noting these and other factors, the Officer then concluded: "Given the above, while I accept that there is interest in the applicants' whereabouts by certain individuals, I am unable to conclude from this information that El Chiqui is among those individuals mentioned above, or that the individuals are affiliated with El Chiqui". The Officer concluded the risks are no greater than those faced by the general population and that neither s. 96 nor s. 97 of the *Act* is engaged in the circumstances.

[7] Regarding the possibility of an IFA, the Officer reached the same conclusion as did the RPD. After noting that San Pedro Sula has higher homicide rates than the national average, the Officer concluded there existed a reasonable IFA in La Paz or La Esperenza

III. Relevant Provisions

[8] Section 96 and subsection 97(1) of the *Act* are the relevant provisions in this case and are set out in the attached Schedule.

IV. Grounds of Judicial Review

[9] The Applicants set out five (5) grounds of judicial review including, among others, that the Officer failed to consider the evidence as a whole, acted in a capricious manner, failed to give adequate reasons, and that the decision lacks justification, transparency or intelligibility and falls outside the range of possible, acceptable outcomes which are defensible on the facts and in law. In their written submissions, the Applicants appear to particularize the grounds by contending that the Officer applied the improper test for the determination of an IFA and that he failed to consider the 2016 United Nations High Commission Report titled *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras*.

[10] There is no merit to the contention that the Officer acted in a capricious manner. The allegation of capriciousness amounts to an allegation of a reasonable apprehension of bias, the test for which was set out by de Grandpré J., writing in dissent, in *Committee for Justice & Liberty v Canada (National Energy Board)* (1976), [1978] 1 SCR 369 at p 394:

> "[…] the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information ... [T]hat test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly".

The test is not met in this case. As for the contention the Officer failed to consider the United Nations High Commission Report, there is a presumption that a decision-maker has considered all relevant material (*Quebrada Batero v Canada (Citizenship and Immigration)*, 2017 FC 988 at para 13 citing *Akram v Canada (Minister of Citizenship & Immigration)*, 2004 FC 629 at para 15, *D'Souza v Canada (Minister of Employment & Immigration)* (1982), [1983] 1 FC 343 at para

8 (CA), *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 at para 1 (CA) [*Florea*]; *Sivapathasuntharam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 486 at para 24, citing *Florea*). That presumption has not been overcome in this case. There is no evidence directly contradictory of the country condition documents.

[11] As a result, I will limit my analysis to whether (i) the Officer reasonably concluded the risk to the Applicants was not personalized and, if so, (ii) whether the Officer reasonably concluded that there was a reasonable IFA in La Paz or La Esperenza.

V. Analysis

A. *Standard of Review*

[12] The parties agree that the reasonableness standard of review applies to PRRA applications (*Mbaraga v Canada (Minister of Citizenship and Immigration)*, 2015 FC 580 at para 22; *Yang v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 496 at para 14, 60 Imm LR (4th) 175). In view of this standard, I will not refer to all of the documents submitted by the Applicants in support of their PRRA application. This, because many of them refer to incidents that occurred either before the Applicants left Honduras, before the RPD rendered its decision, or are simply undated. I will not conduct an independent review of the materials to make my own assessment of the facts. That is not the role of this Court in undertaking a judicial review under the reasonableness standard. Rather, I will rely upon conclusions made by the PRRA Officer and assess whether the decision demonstrates justification, transparency, and intelligibility, and falls

within the range of possible, acceptable outcomes, defensible in fact and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

B. *Did the Officer reasonably conclude the risk to the Applicants was not personalized?*

[13] The evidence established that bus drivers are targets of gang extortion. Mr. Balderramos is a bus driver by profession. The evidence also established that those who work on cruise ships are viewed as wealthier than the general population and hence, a better target for extortion. Mr. Balderramos had been a commercial mariner on a cruise ship. The Officer made at least three (3) references to family members of either Mr. Balderramos or Ms. Castejon having been victims of serious crime, or the two (2) adult Applicants having been the subject of enquiries about their whereabouts subsequent to the RPD decision. While I accept that it is not my role on judicial review to reassess the evidence (*Nsimba v Canada (Citizenship and Immigration)*, 2019 FC 542 at para 13; *Kalonji v Canada (Attorney General)*, 2018 FCA 8 at para 7; *Mirmahaleh v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1085 at para 18; *Hidalgo Carranza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 914 at para 17) I do have a responsibility to ensure the PRRA Officer reasonably applied the law. The law requires a PRRA Officer to consider whether the Applicants would be exposed to a new, different, or additional risk that could not have been considered at the time of the RPD decision (*Liyanage v Canada (Citizenship and Immigration*), 2019 FC 194 at para 14; *Perez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1380 at para 12).

[14] In my view, prior to concluding the risk to the Applicants is not personal, the Officer should have considered the personal profile of Mr. Balderramos (*Jama v Canada (Minister of*

Citizenship and Immigration), 2014 FC 668 at para 20, 458 FTR 231, citing *Bastien v Canada (Minister of Citizenship and Immigration)*, 2008 FC 982; *Canada (Minister of Public Safety and Emergency Preparedness) v Burton*, 2013 FC 549 at para 20) and considered that profile against the overwhelming evidence of family members continuing to be victimized or questioned regarding his or his spouse's whereabouts. That profile includes his work as a commercial sailor on a cruise ship, his work as a bus driver, the fact he reported the attempted extortion to police, the fact his spouse reported her attempted kidnapping to police and the fact he left Honduras without paying any extortion money. In addition to the personal profile, the Officer was required to consider the risk of return as at the time of the PRRA decision, whether it was personalized, and regardless of whether that risk came from El Chiqui, the original agent of persecution, or others. In this case the Officer only considered the personalization of the risk as it related to El Chiqui, not others who, by his own conclusion, were looking for the Applicants, and threatening their family members still in Honduras. Given the facts as accepted by the Officer, I am of the view the decision lacks transparency and intelligibility in that the analysis failed to assess current personalized risk upon return, whether that risk came from El Chiqui or others.

C. *Did the Officer apply the correct legal test for an IFA, and, if he did, does the conclusion meet the test of reasonableness?*

[15] In order to establish a viable IFA, an officer must be satisfied, on a balance of probabilities, that (i) there is no serious possibility of the claimant being persecuted in the part of the country where it finds an IFA exists; and (ii) conditions in the part of the country considered to be an IFA are such that it would not be unreasonable in all the circumstances, including those particular to the claimants, for them to seek refuge there (*Kapuuo v Canada (Citizenship and Immigration)*, 2018 FC 1107 at para 18 [*Kapuuo*]).

[16] The Applicants contend the Officer applied an incorrect test in that he applied an elevated standard which required them to refute the RPD's findings regarding the IFA. There is no doubt that an IFA must be considered in light of the circumstances then confronting the Officer. A PRRA officer does not sit on review or appeal from the RPD decision (*Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 at para 12). His or her task is to assess the current circumstances in determining whether an IFA exists, not only the circumstances as they existed at the time of the RPD's decision. While an officer's decision must be read as a whole and not dissected into pieces (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 SCR 458; *Kapuuo*; *Talipoglu v Canada (Minister of Citizenship and Immigration)*, 2014 FC 172 at para 30), compliance with that instruction cannot, in my view, save the decision under review. It appears that none of the evidence of incidents that occurred after the RPD hearing of attacks upon family members still in Honduras and enquiries about the Applicants' current whereabouts were considered in assessing the IFA by the PRRA Officer. The persistence of individuals, El Chiqui or others, to continue threatening the Applicants' family members in Honduras and their enquiries about the Applicants' whereabouts informs whether, at the relevant time, a viable IFA existed.

VI. Conclusion

[17] For the foregoing reasons, I would allow the application for judicial review and refer the matter to another PRRA Officer for re-determination.

[18] None of the parties proposed a question for certification to be considered by the Federal Court of Appeal, and none arises from the facts and law.

JUDGMENT in IMM-5574-18

THIS COURT'S JUDGMENT is that the application for judicial review is granted without costs. The matter is remitted to a different PRRA Officer for re-determination. No question is certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"
Judge

SCHEDULE

***Immigration and Refugee Protection Act*, S.C. 2001, c. 27**	***Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, ch. 27**
Convention Refugee	**Définition de réfugié**
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner
Person in need of protection	**Personne à protéger**
97(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97**(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on	a) soit au risque, s'il y a des

substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats

FEDERAL COURT

SOLICITORS OF RECORD

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