Federal Court  Cour fédérale

Date: 20200327

Docket: IMM-1660-19

Citation: 2020 FC 441

Ottawa, Ontario, March 27, 2020

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

MARILYN CRISTINA RUBIO SIERRA, ERIK ENRIQUE ESPINAL VANEGAS, BRIANNA ESPINAL

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES, AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review of a negative Pre-Removal Risk Assessment [PRRA] decision made on January 23, 2019 [Decision] under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Applicants seek to have the Decision quashed and remitted for reconsideration.

[2] The Applicants are Ms. Sierra, Mr. Espinal Vanegas (her husband), and their daughter. Ms. Sierra is a citizen of Honduras, Mr. Espinal Vanegas is a citizen of El Salvador, and their daughter is a citizen of both the United States and Honduras.

[3] The Applicants have been in the Canadian refugee system before. In December 2010-January 2011, the Applicants entered Canada and filed for refugee protection because of threats and extortion directed toward them by a criminal gang, Mara Salvatrucha (MS-13). The RPD denied them refugee protection on March 19, 2012, primarily because their risks were not sufficiently personalized—the RPD found that the risk of being targeted by MS-13 was faced generally by all citizens of El Salvador/Honduras. This Court refused to grant leave for judicial review of that decision on September 11, 2012. The Applicants left Canada on January 22, 2013.

[4] The Applicants also applied for permanent residency on Humanitarian and Compassionate grounds in June 2012 before they left Canada. This application was denied on July 12, 2013 due to lack of documentation.

[5] On May 31, 2018, the Applicants returned to Canada and attempted to apply for refugee status, but they were denied due to being previously deported persons. They were issued a deportation order and given the chance to present a request for protection via a PRRA. They did so in June 2018. The Decision, rejecting their application, is dated January 23, 2019.

[6] The Decision is now under judicial review. The Applicants request that the Decision be quashed and remitted to a different decision maker.

[7] The application for judicial review is allowed**.** My reasons are set forth below.

II. Decision under Review

[8] The Immigration Officer [Officer] issued a standard-form PRRA result accompanied by his notes. He stated that the primary reason for rejecting the application was that the Applicants "would not be subject to a risk of torture, a risk of persecution, or face a risk to life or risk of cruel and unusual treatment or punishment if returned to their country of nationality or habitual residence" as required.

[9] In his reasons, the Officer outlined the evidence presented in the PRRA application, including Mr. Espinal Vanegas's account of the Applicants' violent experiences in El Salvador and Honduras between 2013 and 2014, their travels to the United States, and eventual return to Canada**.**

[10] The Officer continued by giving a summary of the previous Refugee Protection Division [RPD] decision where their claim for protection was dismissed. In dismissing their claim the RPD determined that the risks the Applicants faced were general in nature—that is, the general population in El Salvador or Honduras faced the same risks of being targeted by MS-13. There was no personal element to the risk.

[11] The Officer then moved on to assess the evidence presented in the PRRA submission. He noted that only new evidence showing risk to the Applicants is relevant at the PRRA stage when a previous Immigration and Refugee Board decision exists: section 113(a) of IRPA. He found that Mr. Espinal Vanegas' affidavit and his counsel's written representations did not meet this criterion because it was not evidence that demonstrated that the Applicants faced a new, personalized risk.

[12] Next, the Officer noted that a PRRA application is not an appeal of the RPD decision, citing a passage from *Escalona Perez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1379 at para 5 [*Perez*] in support of the proposition that it is only "new, different, or additional risk that could not have been contemplated at the time of the RPD decision" that is appropriate for review at the PRRA stage.

[13] The Officer then assessed a number of other submissions, including identity documentation, documentation of the Applicants' interactions with the Canadian Immigration system and this Court, police denunciations, medical reports, the affidavit of Mr. Espinal

Vanegas, the affidavit of Mr. Espinal Vanegas's cousin [Cousin Testimony], pictures of scars, letters of support, and country condition evidence on Honduras and El Salvador. In the end, the Officer found that the evidence before him did not differ greatly from the evidence presented before the RPD previously and could not establish a new risk. He also found that the presented country condition evidence disclosed no new risk.

III. Issues and Standard of Review

[14] In oral submissions at the hearing the Applicants submitted that the standard of review is reasonableness. The Applicants claim that the Officer's decision is unreasonable because he ignored or misconstrued the evidence before him by comparing the facts to the 2012 RPD decision, giving incorrect weight to allegedly new evidence in the PRRA application, and wrongfully assessing the country condition evidence. The Applicants also claim that the officer erred in finding that the risk to the Applicants was general under the section 97 analysis.

[15] The Respondent submits that the officer's decision was reasonable.

[16] I agree with the Respondent's characterization: was the Decision reasonable?

[17] This matter was argued prior to the Supreme Court's decision in Canada *(Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The Court did not direct further submissions on the standard of review and counsel did not request such an opportunity. I have reviewed the Supreme Court's recent review of the Canadian administrative law framework and

find that this question should be assessed under a reasonableness standard of review. I can see no reason to rebut the now-presumed presumption of reasonableness (*Vavilov* at paras 16-17).

IV. Parties' Positions

A. *Was the Decision reasonable?*

[18] The Applicants advance the following arguments:

1. The Officer ignored or misconstrued the evidence before him by comparing the facts to the 2012 RPD decision;
2. The Officer gave improper weight to new evidence in the PRRA application;
3. The Officer wrongfully assessed the country condition evidence briefs; and
4. The Officer erred in finding that the risk to the Applicants was general under the section 97 analysis.

(1) Applicants' Position

[19] On the first point concerning misconstrued or ignored evidence, the Applicants submit that the Officer erred in finding that the evidence of risk before him was the same as that which was previously before the RPD. They argue that the Officer conflated the *reasons* for the risks with the risks themselves, relying on this Court's decision in *Guerrero v Canada (Citizenship and Immigration)*, 2011 FC 1210 at para 29. Therefore, the Applicants' claim, the Officer did not properly consider the evidence that was before him because he misconstrued it as both (a) non-

new evidence and (b) evidence only of general risk. The Applicants argue that the 2012 facts are different from the circumstances set out in their PRRA application but that the agent of persecution is the same.

[20] On the second point concerning improper weight given to the evidence, the Applicants submit that the Officer did not consider what the evidence *did* say, but instead improperly focused on what it *did not* say. In addition, they take issue with the Officer assigning little weight to the Cousin Testimony because it was not unbiased and its source was not disinterested in the outcome. The Applicants note that nearly any piece of evidence presented will be self-serving and benefit the presenter's case.

[21] On the third point concerning the Officer's assessment of country condition evidence, the Applicants submit that the Officer wrongly determined that the new country condition documents did not "overcome the Board's finding that… the risk the Applicants face is generalized". They state that the evidence supports the finding of a personalized risk, and the brief reasons given were not sufficiently clear or transparent.

[22] On the fourth point, the Applicants further claim that generalized risk exclusions should only apply where there are "extreme situations […] that would involve all other inhabitants of an entire country", per this Court's remarks in *Surajnarain v Canada (Citizenship and Immigration)*, 2008 FC 1165 at paras 18-19. They claim that not all Hondurans/El Salvadorians are faced with the same risks that they have faced from MS-13, so their risks are not of a general nature. They cite several cases from this Court that show that, when a generalized risk

materializes and targets an individual, it can no longer be characterized as general (*Correa v Canada (Citizenship and Immigration)*, 2014 FC 252 at paras 46, 84, 89; *Martinez Pineda v Canada (Citizenship and Immigration)*, 2007 FC 365 at paras 13-15, 17).

(2) Respondent's Position

[23] The Respondent argues that the Applicants seek to have this Court re-weigh the evidence that was before the Officer. They maintain that it was reasonable for the Officer to find that there was only generalized risk in this case. They also state that the Officer reasonably assessed the evidence and properly assigned it little weight.

V. Analysis

A. *Was the Decision Reasonable?*

[24] The reasonableness of the decision will be reviewed in two parts—first, I examine whether the Officer unreasonably assessed the evidence before him. Then, I examine whether, given his assessment of the evidence, his conclusions were reasonable overall.

(1) Applicable Law

[25] The PRRA is a vehicle for assessing, on a "last chance" basis, whether someone qualifies under IRPA section 97 as a Convention Refugee, or that they would be at risk of torture or cruel or unusual treatment or punishment based on new evidence since their last assessment (usually by the RPD). As stated by Justice Mactavish in *Hausleitner v Canada (Minister of Citizenship*

and Immigration), 2005 FC 641 at para 32, the risk assessment carried out in the PRRA stage is not a reconsideration of the RPD's decision, but is rather limited to the evaluation of the new evidence available.

(2) The Officer's Assessment of the Evidence

[26] As previously noted, the reasonableness standard of review allows a PRRA Officer a high degree of discretion when assessing or weighing evidence.

[27] The Officer assessed five bundles of evidence: (1) Personal Document Brief No. 1, (2) Personal Document Brief No. 2, (3) Personal Document Brief No. 3, (4) Country Condition Evidence of Honduras, and (5) Country Condition Evidence of El Salvador.

[28] Given the contents of Personal Documents Briefs No. 1 and No. 2, I find that it was reasonable for the Officer to disregard them. Neither of the briefs contain information about new risks that the Applicants have faced. Brief No. 1 contained documents that established the identity of the Applicants. The second comprised materials from their previous refugee protection and Humanitarian and Compassionate exemption claims. The Applicants do not appear to take issue with the Officer's assessment of this evidence as irrelevant to their PRRA claim.

(a) *Personal Document Brief No. 3*

[29] Personal Document Brief No. 3 contains (1) Police Denunciations, (2) Medical Reports, (3) Cousin Testimony, (4) Pictures of scars, and (5) letters of support from Canadian pastors. The Officer assigned little weight to the Police Denunciations, Medical Reports, and Cousin Testimony for various reasons, which the Applicants dispute. He also assigned little weight to the letters of support, which the Applicants do not dispute.

[30] What is left and contested, then, are: (1) the Police Denunciations, (2) the Medical Reports, (3) Cousin Testimony, and (4) the pictures of scars.

[31] I see no issue with the way the Officer assessed the medical evidence—the medical reports and the photos of scars— by giving them little weight. The medical reports contained hearsay evidence, and the scar photos contained no identifying information that could show that they were of the Applicants. They could have been from anyone. Further, the Officer did not assign these pieces of evidence *no* weight, but only *little* weight; he did not ignore the evidence entirely.

[32] Concerning the Cousin Testimony and the Police Denunciations I find the Officer's analysis to be lacking. The Officer gave the Cousin Testimony little weight because it was not from an "unbiased source disinterested in the outcome of the present application" and was "not supported with sufficient objective evidence". It is difficult to produce pieces of evidence that will satisfy an Officer, especially in cases where testifying parties have reasons not to contact police and gain objective support for their claims through an objective police report or other document.

[33] Further, Justice Teitelbaum has stated the following in *Ray v Canada (Minister of Citizenship and Immigration),* 2006 FC 731 at para 39:

> I agree with the Applicant that the PRRA Officer erred by granting little probative value to the letters on the basis that the letters support the applicant's personal interest. The mere fact that the letters were written by the Applicants' relatives is insufficient grounds, without other evidence of dishonesty or other improper conduct on the relatives' part, to accord their letters little weight. However, the PRRA Officer did not decide to grant these letters little weight solely on this basis. […]

[34] The Officer stated that the Cousin Testimony was not backed up by corroborating evidence, but this leaves one to wonder what type of corroborating evidence might have been produced, given the circumstances alleged by the Applicant's cousin. I am concerned that the Officer has not provided sufficient justification for giving the Cousin Testimony little weight.

[35] In this case, the Applicants also provided three Police Denunciations (dated May 2, 2014, May 22, 2014 and October 2, 2014) in addition to the Cousin Testimony. The Police Denunciations describe new risks than those considered by the RPD. Two of the Police Denunciations related to events in El Salvador while the third related to an event in Honduras. The risk to the Applicants appeared to be escalating particularly when viewing the October 2014 police denunciation in Honduras where the Applicants alleged that they were shot at. Despite the evidence of the Police Denunciations, along with the Cousin Testimony, the Officer simply determined that insufficient objective evidence was presented to show that the Applicants exhausted "all potential avenues of state protection available in their country". This is in spite of Police Denunciations in two countries where one of the police officers in El Salvador recommended that the Applicants leave the country, which they did, only to be met with new

violence by likely the same perpetrators in Honduras. It is not clear what weight the Officer gave to the Police Denunciations in relation to the other evidence considered.

(b) *Country Condition Evidence – Honduras / El Salvador*

[36] The Applicants provided country condition evidence highlighting the dangerous situations present in El Salvador and Honduras, which the Officer noted was "general information" and did not establish personal risk. In *Kaba v Canada (Citizenship and Immigration)*, 2007 FC 647 at para 1, Justice Shore found that documentary country evidence itself (without a sufficient connection to the Applicant) is insufficient to warrant a positive risk assessment.

[37] It is true that, on their own, the country condition evidence does not establish a personal risk. However, the Officer viewed the country condition evidence in isolation without a more fulsome examination of the Police Denunciations and the Cousin Testimony, which highlighted the personalized and escalating nature of the risk to the Applicants.

(c) *The Officer's Alleged Comparisons to the RPD decision – "more of the same"*

[38] The Applicants claim that the Officer erred by concluding that the facts presented before him should not have been considered because they were no different from those considered in the RPD decision. They rely on Justice Diner's comments in *Valencia Martinez v Canada (Citizenship and Immigration)*, 2019 FC 1 [*Valencia Martinez*] for the proposition that Officers

cannot simply state that evidence is "more of the same" and dismiss it; they must conduct a full assessment of the new evidence before them.

[39] I take Justice Diner's comments in *Valencia Martinez* to mean that the Officer cannot *solely* rely on saying that evidence is "more of the same". The Officer noted in several instances that it was the same type of evidence that was before the RPD. This is an over-simplification of matters. The RPD's assessment of the risk in Honduras in 2012 related to the recruitment of Ms. Sierra's brother into a gang while the risk presented in the PRRA application (June 2018) related to a shooting at the Applicants' vehicle by most likely the MS-13. By over-simplifying matters and equating the risks as the same, or essentially the same, the Officer was not alive to the new evidence presented. The PRRA decision is lengthy and the Officer documents each piece of evidence, but I find that the rationale for providing little weight to the evidence of new and escalating risk is lacking.

(d) *The Officer's Conclusions*

[40] The strongest pieces of evidence before the Officer that the Applicants faced new risks appeared to be the Police Denunciations and the Cousin Testimony. The Officer concludes that these pieces of evidence suffered from flaws which necessitated giving them little weight. The Officer concludes, that, "the documentation does not establish that the applicants are persons of interest or that they are actively being targeted or sought by gang members, or anyone for that matter."

[41] I find that the Officer unreasonably considered the Cousin Testimony and the Police Denunciations in the consideration of whether the Applicants presented evidence of new risk. In *Vavilov* at para 86, the Supreme Court stated that decisions must not only be *justifiable*, but *justified*. I find that the Officer's reasoning is insufficient and cannot stand.

VI. Conclusion

[42] The Officer's PRRA decision is not reasonable. The application for judicial review is allowed.

[43] Neither party has raised a question for certification and in my view none arises.

JUDGMENT in IMM-1660-19

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is allowed.
2. There is no question for certification.
3. There is no order for costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1660-19
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