

Federal Court



Cour fédérale

Date: 20201208

Docket: IMM-7175-19

Citation: 2020 FC 1130

Ottawa, Ontario, December 8, 2020

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**JATINDER KAUR
LOVEPREET SINGH
EKAMDEEP KAUR**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a Refugee Appeal Division [RAD] decision dated November 8, 2019 [the Decision], confirming a Refugee Protection Division [RPD] decision, which determined that the Applicants are not Convention refugees pursuant to s 96 of

the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] nor persons in need of protection pursuant to s 97 of IRPA.

[2] As explained in more detail below, this application is dismissed, because the Decision is reasonable and resulted from a process that was procedurally fair.

II. **Background**

[3] The principal Applicant, Jatinder Kaur, is the mother of the other two Applicants, who are minors. The principal Applicant was born in India but became a Mexican citizen in 2016, at which time she lost her Indian citizenship. Her children were born in Mexico and are Mexican citizens.

[4] The principal Applicant and her husband travelled from India to Mexico on work permits around 2004 and opened a clothing store in Morolón, Mexico. Shortly after they opened the store, local gang members demanded monthly payments from their business under threat of physical violence. They paid the extortion demands each month. In 2008, the principal Applicant and her family moved to Los Mochis, Mexico and opened a new clothing store. However, they were once again extorted by gang members. A policeman who frequented the Applicants' store advised them that the police are powerless against the crime syndicates and that they should move to evade extortion. In July 2013, the family moved to Mexicali, Mexico and opened yet another clothing store. They were again targeted by gang members within a few months of opening the store.

[5] On July 11, 2018, the Applicants travelled to Canada as visitors. They applied for refugee status in Canada on September 4, 2018. The Applicants claimed fear of persecution on the basis of race, alleging that they were targeted by gangs in Mexico because, being from India, they are a visible minority in Mexico. The Applicants currently live in Montreal, Quebec. The principal Applicant's husband (and father of the minor Applicants) also lives in Montreal but is not part of his family's refugee application.

[6] The Applicants' claim was heard by the RPD on July 30, 2019. The RPD issued a negative decision on August 23, 2019, and the Applicants appealed the RPD decision to the RAD.

III. **The RAD Decision**

[7] The RAD began its analysis by considering the RPD's finding that the Applicants have no claim under s 96 of IRPA. On appeal, the Applicants alleged that the RPD had erred in finding that the Applicants' claim lacked a nexus to a Convention ground by (a) engaging in a microscopic examination of the evidence, (b) expecting witness corroboration in the absence of an adverse credibility finding, and (c) providing inadequate reasons on the issue of nexus.

[8] The RAD dismissed the Applicants' argument that the RPD's assessment of the evidence was selective and upheld the RPD's finding that there was insufficient evidence to establish a nexus to a Convention ground. The RPD had found insufficient evidence, because the principal Applicant made no reference to her Indian origin or ethnicity in her testimony about the gang

threats and because documentary evidence indicated that extortion is an endemic problem in Mexico that affects the population as a whole.

[9] The RAD determined that the RPD correctly found that the Applicants made no reference to their Indian origin or ethnicity when testifying about the gang threats. The RAD noted that the RPD had not specifically asked the principal Applicant to explain why she did not mention her ethnicity when testifying about the threats from the gang. However, the RAD explained that not asking the principal Applicant why she had not referred to her ethnicity was not an error, as the RPD did not make a negative credibility finding on that basis.

[10] The RAD noted that establishing a nexus requires evidence of a clear link between a refugee claimant and a Convention ground. The RAD cited the Federal Court's decision in *Gonsalves v Canada (Attorney General)*, 2011 FC 648 [*Gonsalves*] for the principle that it is possible to establish a nexus to a Convention ground where there are mixed motives, but only where there is reliable and persuasive evidence to suggest that a Convention ground formed part of the reasons for the targeting. The RAD found that there was no such evidence before the RPD or on appeal.

[11] The RAD observed that the Applicants did not allege that there were any racist statements levied against them in the course of the extortion. Rather, the Applicants indicated in their Basis of Claim [BOC] forms that they believed that their Indian heritage was connected to the extortion demands, because Mexico is a racist society and they are seen as targets because they lack community connections. The RAD dismissed this allegation because the presumption

of truthfulness that applies to facts alleged by refugee claimants does not apply to belief, speculation or deductions made based on those facts.

[12] The Applicants also did not point to any objective country condition evidence supporting their allegation that race is a motivating factor for extortion or crime in Mexico. The RAD found no indication in the documentary evidence that racial minorities are disproportionately targeted, or that race is a motivating factor.

[13] In assessing whether the Appellants provided sufficient evidence to establish a nexus to a Convention ground, the RPD had observed that the principal Applicant's husband had not provided a written statement or given testimony, even though he lived in Montreal at the time of the RPD hearing. The husband's evidence was important, because the principal Applicant alleged that it was her husband who received all of the extortion demands. The RAD found that the RPD did not err in noting the absence of the husband's evidence. As it was the Applicants' responsibility to obtain evidence that may support their claim, an adverse inference could be drawn in the face of an unreasonable explanation for failing to make efforts to provide such critical and reasonably available evidence.

[14] The RAD independently considered whether there is an underlying Convention reason for the Applicants' claims and found it more probable than not that the Applicants do not face a serious possibility of persecution by reason of their race or any other Convention ground. The RAD found no nexus to a Convention ground, and therefore found that the Applicants do not have a claim under s 96 of IRPA.

[15] The RAD then turned to the RPD's assessment of the Applicants' claim under s 97 of IRPA. The principal Applicant had Indian citizenship until 2016. When asked by the RPD why she did not return to India to escape the alleged extortion, the principal Applicant said that she and her husband did not own property or a business in India. The RPD found this behavior incompatible with that of an individual personally facing a risk to her life or a risk to the lives of her children. On appeal to the RAD, the Applicants argued that the RAD had erred by considering the principal Applicant's explanation for not returning to India from its own perspective rather than the perspective of the Applicants. The RAD dismissed this argument, explaining that the mere fact that the RPD did not find the principal Applicant's explanation sufficient does not mean that it considered the explanation from its own perspective.

[16] In conclusion, the RAD dismissed the appeal and confirmed the RPD's decision.

IV. **Issues and Standard of Review**

[17] The Applicants' Memorandum of Fact and Law articulates the sole issue for the Court's consideration as follows:

Did the tribunal commit a reviewable error in law by finding that the Applicants failed to establish a nexus to the Convention ground of race and therefore do not have a well-founded fear of persecution under section 96 of the IRPA?

[18] The Applicants' Memorandum of Fact and Law suggested that this issue was reviewable on a standard of correctness. However, at the hearing of this application, the Applicants' counsel noted that, in *Gonsalves*, a case which addressed the possibility of "mixed motives" for a

claimant being targeted by criminals, Justice Zinn employed the standard of reasonableness (at para 29). The Applicants' counsel therefore agreed with the Respondent's position that the standard of reasonableness applies to the above issue. I concur.

[19] However, the Applicants also characterize one of the arguments raised in this application as a matter of procedural fairness. The Applicants argue that, before concluding there was insufficient evidence to establish a nexus to the Convention ground of race, the RPD was obliged to question the Applicants, or otherwise put them on notice that it was concerned about insufficiency of evidence, on this point. They submit the failure to do so represented a breach of procedural fairness by the RPD and that the RAD erred in dismissing the appeal despite this breach.

[20] The Respondent disagrees that this argument raises an issue properly characterized as one of procedural fairness. I concur with the Applicants that their argument raises a question of whether the process followed by the RPD was procedurally fair. I will therefore treat this argument as a separate issue and apply the standard of correctness to the RAD's treatment of this issue. I would articulate this issue as follows:

Did the RAD err in its determination that it was not procedurally unfair for the RPD to have failed to question the principal Applicant about her allegations that the extortion was racially motivated?

V. Analysis

A. *Did the tribunal commit a reviewable error in law by finding that the Applicants failed to establish a nexus to the Convention ground of race and therefore do not have a well-founded fear of persecution under section 96 of the IRPA?*

[21] The Applicants' arguments on this issue surround the so-called "mixed motives doctrine," described in cases such as *Gonsalves*. This doctrine concerns the fact that an agent of persecution can have more than one motive for persecution of a claimant. In *Canada (Citizenship and Immigration) v B344*, 2013 FC 447, Justice Noël held that, if one of the motivations of the agent of persecution is race, in combination with another factor, that is sufficient to meet the requirements of s 96 of the IRPA. The Applicants emphasize Justice Noël's explanation that s 96 of the IRPA is not to be interpreted in a narrow restrictive fashion (at para 37).

[22] The Applicants also refer to an example provided on the website of Citizenship and Immigration Canada, elaborating upon the reasoning in *B344*, to the effect that extortionists, whose motive is criminal, may target persons whose race, religion or imputed political opinions make them less likely to be able to access protection.

[23] Turning to *Gonsalves*, the Applicants rely on Justice Zinn's explanation that, if there is some evidence as to the possibility of mixed motives, the RPD errs if it fails to consider whether the motives could give rise to the necessary Convention nexus (at para 29):

29 The Board's conclusion is unreasonable because it approaches the issue of motive for the attacks as a yes or no question. The criminals targeting the applicants may have been motivated by a combination of the applicants' racial and economic status. That the

motive is at least not purely economic is supported by the applicants' reference to racial slurs made against them during the incidents they allege. It is further supported by other evidence, namely the testimony given by the applicants. In *Katwaru v. Canada*, [2007] FCJ No 822 (FC), this Court left open the possibility that where at least one of the motives is based on a convention ground, nexus might be established. The Court there decided there was not enough evidence to establish race as a motive, and therefore declined to find mixed motives. However, the Court left open the possibility that nexus may be found where there is evidence to support both alleged motives. In this case there was some evidence before the Board as to the possibility of mixed motives and therefore the Board erred in failing to consider whether there were mixed motives and if so, whether the motives could constitute the convention nexus required.

[Applicants' emphasis]

[24] I do not understand the Respondent to take issue with the legal principles advanced in these sources.

[25] The Applicants argue that the RAD erred by applying the mixed motives doctrine in an overly restrictive manner, failing to take into account both evidence in the Applicants' BOC narrative and country condition evidence supporting mixed motives on the part of the gangs that were extorting the Applicants' businesses.

[26] The paragraphs of the BOC upon which the Applicants rely state as follows:

We are not of the Hispanic race, being from India, and we are members of a visible minority group in a country where there is a lot of racism and intolerance for other races, even against their own indigenous people of Mexico. As real outsiders, we are not accepted as equals by the mainstream of Mexican society. Rather, we are seen as targets since the gangs know we have no connections or clout in the community.

....

The gang problem is endemic in Mexico. There are criminal organizations all over, ranging from small, local, loosely organized gangs to highly organized, large gangs with influence in large parts of Mexico. Moving almost 1,000 kilometres away from Los Mochis was no help to our situation, We were simply re-victimized by a new gang due to our race. Because of the widespread problem of gangs in Mexico, the lack of police interest and intervention in extortion crimes against small business owners such as ourselves, the racism in Mexico, and our lack of any meaningful way to safely protect ourselves from these gangs, we have no hope of living in peace and security in Mexico, unmolested by these criminals.

[27] The RAD noted that the Applicants' BOC alleges that they were targeted due to their race and that they believed their Indian heritage was connected to the extortion demands, because Mexico is a racist society and they are seen as targets because they lack community connections. However, the RAD also observed that the Applicants did not, either in their BOC or in testimony, allege that there were ever any racist statements levied against them, in the course of the gangs' extortion threats or visits to the business to collect payments, or indeed allege any facts particular to the extortion threats that would support an inference that they were targeted because of their race.

[28] In reliance on *Gonsalves*, the RAD accepted that it is possible to establish a nexus to a Convention ground where there are mixed motives, but only where there is reliable and persuasive evidence to suggest that a Convention ground formed part of the reason for the targeting. The RAD concluded that, apart from the principal Applicant's statement as to her belief in her BOC, there was no such evidence. The RAD distinguished *Gonsalves*, as the facts of that case included racial slurs directed towards the claimants.

[29] I note the Applicants' argument that evidence of a racial component to persecution is not confined to evidence of racial slurs. While I agree with this point, I do not read the Decision as turning solely on the absence of evidence of racial slurs. The RAD identified that the BOC did not allege any facts particular to the extortion threats that would support the inference that they were racially motivated. The RAD's reasoning was that, while the BOC stated the principal Applicant's belief in the racial motivation, there were no facts of any sort associated with the incidents of persecution that could link them to the Convention ground. This reasoning is consistent with the authorities, and I find nothing unreasonable in this aspect of the RAD's analysis.

[30] The Applicants also argue that the evidence capable of supporting a conclusion of mixed motives can include country condition evidence. The Applicants refer to documentary evidence noted by the RAD as speaking to the prevalence of racism in Mexico. However, the Applicants have not identified any such evidence that links racism to extortion against business owners. The Applicants do focus upon one item from the National Documentary Package for Mexico, which refers to the Los Zetas gang often targeting migrants. However, this item is among those footnoted by the RAD in its Decision, in describing the targets of extortion as often including migrants without regular immigration status. The Applicants have not demonstrated that this item represents evidence of a link between race and extortion that was overlooked by the RAD.

[31] Finally, I note that the Applicants argue the RAD erred in the standard it applied to determine whether the Applicants faced a serious possibility of persecution by reason of their race. They refer to the following finding of the RAD:

... I find it more probable than not that the Appellants do not face a serious possibility of persecution by reason of their race, nationality, political opinion, religion, or particular social group, and that there is no nexus to a Convention ground. ...

[Applicants' emphasis]

[32] The Applicants argue that the use of the words “more probable than not” represents application of an overly burdensome standard. I find no merit to this submission. As the Respondent correctly argues, claimants must establish on a balance of probabilities that they will be exposed to a serious possibility of persecution (see, e.g., *Mariko v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1136 at paras 18-19). I read the RAD’s use of the words “more probable than not” to relate to the balance of probabilities upon which claimants must establish their case. This language does not demonstrate a reviewable error.

[33] The Applicants’ arguments raise no basis to conclude that the Decision is unreasonable. I therefore turn to their procedural fairness argument.

B. *Did the RAD err in its determination that it was not procedurally unfair for the RPD to have failed to question the principal Applicant about her allegations that the extortion was racially motivated?*

[34] The Applicants note that the RAD did engage with the question whether the RPD erred by failing to question the principal Applicant about the alleged racial motivation for the extortion. The RAD analyzed this issue as follows:

Having listened to the entire RPD hearing audio-recording, I note the RPD is correct that the Principal Appellant made no reference in testimony to her family’s Indian origin or ethnicity when asked by the RPD about the alleged gang threats. Upon my own

independent assessment, I note that it would have been preferable for the RPD to specifically ask the Principal Appellant to explain why she did not mention her ethnicity when testifying about the threats from the gang. However, given that the RPD did not make a negative credibility finding on this basis, I do not find this to be an error. Moreover, Counsel did not ask the Appellants any questions but had the opportunity to do so if he believed additional testimony was necessary.

[35] The Applicants submit that, applying the RAD's reasoning, a refugee claimant would be unfairly deprived of the opportunity to know and respond to concerns that the RPD may have about the claim. They also rely on the refugee hearing process, which is not a traditional adversarial model involving two opponents presenting their respective positions to a decision-maker. Rather, they say, the RPD fulfills a somewhat inquisitorial role, asking questions of the claimant, with the claimant's counsel then afforded an opportunity to question the claimant or otherwise adduce evidence. The Applicants submit that this model imposes on the RPD an obligation to ask questions upon, or otherwise identify, areas that it considers require clarification, so that the claimants and their counsel have an opportunity to address them.

[36] I note that, at the hearing of this application, the Respondent's counsel took issue with the Applicants' framing of this issue as related to the structure of the RPD hearing process, as it was not framed in this manner in the Applicants' written materials and the Court has been provided with no evidence on the structure of the hearing process. In response, the Applicants' counsel submitted that the procedural fairness issue they are raising applies regardless of the particular hearing structure and is only heightened by the inquisitorial nature of the RPD's role.

[37] While I agree with the procedural point raised by the Respondent, I am prepared to take at face value the submissions of the Applicants' counsel as to the structure of the RPD hearing process. In my view, the particular structure upon which he relies does not change the outcome of the procedural fairness analysis.

[38] Ultimately, when an allegation of a breach of procedural fairness is raised in an application for judicial review, the question for consideration is whether the relevant party knew the case to meet and had a full and fair chance to respond. In the present case, the fact the RPD did not ask the principal Applicant why she did not mention her Indian heritage in her testimony about the extortion threats, or otherwise advise her that it was concerned about whether there was a nexus to race, did not deprive her of knowledge of what she was required to prove. The onus is on a refugee claimant advancing a claim under s 96 of IRPA to establish a subjective and objective fear of persecution (see, e.g., *Elisme v Canada (Citizenship and Immigration)*, 2019 FC 1306 at para 22), which includes leading sufficient evidence to establish a nexus to a Convention ground.

[39] The RAD's Decision identifies that it may have been an error for the RPD to have failed to question the principal Applicant on the nexus issue, if the RPD had made a negative credibility finding on this issue. This is an example of a situation where procedural fairness would dictate that notice be given to a claimant, because otherwise the claimant would not necessarily know about the credibility concern (see, e.g., *Isapourkhoramdehi v Canada (Citizenship and Immigration)*, 2018 FC 819 at para 17). However, establishing a nexus to a Convention ground is invariably a component of a claim under s 96 of IRPA. The RPD therefore

has no obligation, stemming from principles of procedural fairness, to alert a claimant to the requirement to adduce sufficient evidence on this issue.

[40] Applying the standard of correctness, I agree with the RAD's conclusion that the RPD did not err in failing to ask the principal Applicant questions related to the nexus to the Convention. Put otherwise, I find the RPD's process was fair and the RAD did not err in rejecting this argument as a ground of appeal.

VI. **Conclusion**

[41] Having found no reviewable error in the Decision, this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-7175-19

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

No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7175-19

STYLE OF CAUSE: JATINDER KAUR
LOVEPREET SINGH
EKAMDEEP KAUR
V THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

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