Federal Court  Cour fédérale

Date: 20120905

Docket: IMM-509-12

Citation: 2012 FC 1054

Toronto, Ontario, September 5, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

OMAR ALFREDO SANCHEZ AGUILAR,
LILIANA GUEVARA MONZON,
JOSE MARIA SANCHEZ GUEVARA AND
JOSUE ROBERTO SANCHEZ GUEVARA

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] For the reasons that follow, this application for judicial review of a negative Pre-Removal Risk Assessment (PRRA) decision by an immigration officer, dated November 22, 2011, is dismissed.

Background

[2] The applicants are a family. Omar Alfredo Sanchez Aguilar (father) and Josue Roberto Sanchez Guevara (child) are citizens of El Salvador; Liliana Guevara Monzon (mother) and Jose Maria Sanchez Guevara (child) are citizens of Guatemala. They fear harm from Maras criminal gangs in El Salvador and Guatemala.

[3] The gangs extorted money from Mr. Sanchez Aguilar, a self-employed fruit and vegetable importer, by threatening harm to him and his family. The extortion took place in 2004 and 2005 in both El Salvador and Guatemala, as he did business in both countries. Mr. Sanchez Aguilar initially made payments to the gangs but was unable to meet their increasing demands. During one of the extortion demands, in September 2004, the principal applicant was stabbed and grazed by a bullet. He claims to have attempted to make a police report, but says that the police refused to accept his denunciation on the basis that they themselves feared the Maras gangs.

[4] The applicants fled to the United States in 2006 and made a refugee claim, which was rejected in 2007. Although a deportation order was issued, the applicants remained in the United States as they feared returning to El Salvador or Guatemala. The family arrived in Canada at Fort Erie, Ontario, on February 25, 2009, and made a refugee claim.

[5] The Board rejected the applicants' refugee claim on March 7, 2011. Although it accepted that the events alleged occurred, it held that there was no nexus to a Convention ground and that the risk they faced was one faced generally by a sufficiently large cross-section of individuals in both countries to exempt them from qualifying as 'persons in need of protection' within the meaning of section 97 of the Act. Leave for judicial review of the decision was denied by this Court.

[6] The applicants made a PRRA application and submitted new evidence concerning recent incidents involving a sister, who lives in El Salvador. This sister, Maria Carlota Sanchez Aguilar, provided a notarized statement that she had been the victim of a gunpoint ATM robbery; a severe physical attack; and several threats by the Maras gangs, which included reference to Mr. Sanchez Aguilar personally and his outstanding 'debt' to them. She attempted to make a police report about the physical attack, but the police made fun of her and did not accept her report. She provided a physician's notarized statement, which stated that she had suffered "multiple injuries and [was] unconscious" on the date she claims to have been attacked. She says that on the same night as the physical attack, she received a phone call from an individual identifying himself as a member of the Mara Salvatrucha who stated that he knew she went to the police and threatened her life and reminded her of the outstanding debt of Mr. Sanchez Aguilar.

[7] The officer found that it was speculative to conclude that the incidents involving Ms. Sanchez Aguilar, while "not doubt[ed]," occurred as a result of her connection to Mr. Sanchez Aguilar. As a result, and for additional reasons, the officer stated that little weight should be

given to Maria Carlota's evidence as predictive of the harm anticipated by the applicants at the hands of the maras.

[8] Regarding the test under s. 97 of the Act, the officer held that:

> "[T]here is insufficient evidence that demonstrates on the balance of probabilities that the applicant and his family face a forward-looking personalized risk to his [sic] life or risk of cruel and unusual treatment or punishment in El Salvador or in Guatemala as opposed to a generalized risk of crime or violence at the hands of the criminals in general. While not perfect, […] in the unlikely event that [applicants] would face serious harm on their return, adequate state protection would be available to them in those countries." [emphasis added]

Issues

[9] The issues raised by the applicants may be characterized as follows:

1. Was the officer's finding of adequate state protection unreasonable, in that it:
    a. contradicted the finding of generalized risk;
    b. was based on the wrong test and ignored the evidence; or
    c. ignored the particular situation of the applicants?
2. Was the officer's finding of insufficient evidence a veiled credibility finding, and did the officer therefore err by failing to convoke an oral hearing?

Analysis

1. State Protection Finding

The Alleged Contradiction

[10] The applicants submit that a finding of both generalized risk and adequate state protection under subparagraphs 97(1)(b)(i) and (ii) of the Act is "not logical and [is] contradictory," and therefore unreasonable according to the standard articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9. In other words, the applicants submit that "implicitly contained within a generalized risk finding is a finding of lack of state protection."

[11] The submission made this broadly cannot be correct as it is based on a presumption not of adequate state protection, which entails that some risk will always be present, but of perfect state protection which entails that all of the identified risk has been eradicated.

[12] When pressed, counsel for the applicants stated that it is her submission that where there is a finding that there is risk to a very large portion of the general public, then it cannot also be said that there is adequate state protection, for otherwise the extent of the risk that exists would not be so great.

[13] The respondents submit that the concepts of a risk "generally faced by other individuals in or from that country" and "the protection of that country" as those phrases appear in paragraphs 97(1)(b)(i) and (ii) are two distinct and separate concepts that have nothing to do with each other.

[14] I agree with the respondents; however, the existence of a prevalent, probable, and severe risk may be a reliable indicator that state protection is inadequate. Even then, the existence of such a risk is only a factual indicator, and the two inquiries remain distinct. Here the Board found that the nature of the risk was one that others in these countries also faced, but it did not

make any finding, as is implied in the applicant's submission, that it was a risk likely to happen to a great number of persons in the countries of origin. The officer's finding of both generalized risk and adequate state protection was not therefore unreasonable.

Application of the Wrong Test and Ignoring Evidence

[15] The applicants submit that the officer erred in law in her state protection analysis by focusing on the measures being taken by the states in question and not the results or effectiveness of those measures and erred by ignoring or selectively using certain evidence on country conditions. I find neither error was made.

[16] The officer spends much of the decision outlining measures being taken to combat gang-violence in both countries, and indeed concludes at one point that "serious efforts" were being made; however, reference is also often made of the outcomes of those measures in El Salvador. For example, the officer references five recent and separate mass arrests of Maras gang members made in the first half of 2011; notes that 70% of extortion complaints are heard in court and that protection to victims is offered at trial; notes that in the past ten years, dozens of police officers have been convicted for criminality and that a 2008 police disciplinary law resulted, in 2009, in roughly 140 members of the police force (including several very senior officers) being removed from their position; and lastly notes that the homicide rate has fallen in 2010 by roughly 10%. The officer similarly references outcomes in Guatemala.

[17] Neither am I persuaded that the officer made selective use of the evidence and ignored evidence favourable to the applicants. Although the officer does not make extensive direct reference to the applicants' sources, she candidly acknowledges throughout the PRRA decision that the incidence of crime, gang-related violence, and corruption within the state protection apparatus is still a serious problem in El Salvador and Guatemala.

[18] The information before the officer showed that while far from perfect, both states had both the ability to, and actually did, target and prosecute gang-related crime, including extortion, and corruption within the state protection apparatus. The officer expressly acknowledged that success has been mixed, but concluded that, at a systemic level, the state apparatus in both countries was able and actually did provide protection for its citizens. Based on the record before her, that was not an unreasonable finding.

Ignored the Particular Situation of the Applicants

[19] The applicants submit that the officer did not apply the correct legal test for state protection because she failed to take into account their particular situation, namely that the Maras have police connections and were able to find out that Maria Carlota had tried to make a denunciation, that the police had refused to take a report, and that the Maras remained interested in Mr. Sanchez Aguilar.

[20] While specific reference is not made to these aspects of her affidavit, I am unable to conclude that it could have had any impact on the finding of adequate state protection and the

specific finding that the limited efforts of these applicants to seek state protection had failed to rebut the presumption that it exists.

2. Veiled Credibility Finding and Failure to Convoke an Oral Hearing

[21] The applicant submits that the officer made "veiled" findings of credibility in respect of Maria Carlota and should have convoked an oral hearing to assess credibility.

[22] The applicants submit that the officer "fail[s] to engage with the … evidence that dealt directly with the specific and personalized risk faced by the applicants." There is merit to the assertion that the officer failed to characterize the risk facing the applicants with sufficient precision. The evidence, if believed, shows that, to some extent, Mr. Sanchez Aguilar was being targeted personally; yet the officer merely characterizes the risk facing the applicants as that of "crime or violence." However, it is not determinative of the necessity of an oral hearing or, more importantly, the application as a whole. Even if believed, Maria Carlota's evidence concerning her singular attempt at making a police report would not have been sufficient to prove that the applicants were unable to seek the protection of the state. The test set out in s. 167(c) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, is whether the evidence would, if believed, "justify allowing the application for protection." The sufficiency of her evidence, not her credibility, is what matters. Her evidence, even if believed, is not sufficient to rebut the presumption of state protection. There was therefore no need for an oral hearing.

[23] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-509-12
STYLE OF CAUSE:	OMAR ALFREDO SANCHEZ AGUILAR, LILIANA GUEVARA MONZON, JOSE MARIA SANCHEZ GUEVARA AND JOSUE ROBERTO SANCHEZ GUEVARA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
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