Federal Court Cour fédérale

Date: 20120925

Docket: IMM-761-12

Citation: 2012 FC 1116

Ottawa, Ontario, September 25, 2012

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

MARCO ANTONIO ROMERO DAVILA
WILDER ROMERO DAVILA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board [panel], rendered on December 22, 2011, wherein the panel concluded that the applicants were neither Convention refugees nor persons in need of protection, within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons below, I find the panel's key findings to be reasonable in the circumstances. The applicants have not established that the impugned decision is one which can be characterized as unreasonable and I find that none of their arguments in this application for judicial review warrant the Court's intervention.

Background

[3] The applicants (the principal applicant, Marco Antonio, and his brother, Wilder) are brothers from Huancayo, Peru. They allege that they fear returning to their country because, as renowned athletes, they have both received threats from members of the Shining Path, a Peruvian guerrilla group which sought to extort money from them.

[4] The applicants allege that in November 1991, their late brother Edgar, who was a national boxing champion in Peru, was targeted for extortion, kidnapped and killed at the age of 24 by members of the Shining Path. His dead body was found in the mountains outside Huancayo with the body of another athlete. The applicants allege that according to the forensic report they both had died from trauma to the head and bullets were found in their bodies. In his narrative in response to question 31 of his Personal Information Form [PIF], the principal applicant claims that his father filed a denunciation about his son's disappearance as the newly elected President Toledo had encouraged people to report their experiences with the country's terrorists. However, the applicants allege that because of numerous attacks against state authorities at the time, no copy of the denunciation would currently be accessible.

[5] The applicants allege that on October 20, 2005, Wilder was kidnapped by members of the Shining Path and was threatened with death if he refused to pay them $6,000 (US). This incident allegedly happened after Wilder had won a financial award in an international competition. Wilder did not report the incident to the police but on October 24, 2005 he temporarily moved to Lima to protect himself from the Shining Path. In October 2005 Wilder was selected to participate in an international marathon competition that took place in New York on November 6, 2005. Wilder alleges that as a result of the threats he had received, he never returned to Peru afterwards. He lived in New Jersey without legal status for five years before applying for refugee status in Canada on January 14, 2011.

[6] The applicants allege that Marco Antonio was targeted and kidnapped by members of the Shining Path on January 10, 2010. He was allegedly threatened with a gun and told that he had ten days to pay $7,000 (US); that way he would have paid the balance his brother Wilder owed to the party. Marco Antonio alleges in his PIF narrative that the assailants also threatened to kill him if he reported them to the police.

[7] Despite these threats, Marco Antonio states in his PIF narrative that he did report the incident to the police five days after it took place but they did not do anything except to tell him "that if something happened again, not to worry about coming back to the police again, that there is nothing they could do. [He] told the police that if they come back to [him he] could be dead. But they did not offer to help; they just said there was nothing they could do."

[8] On January 15, 2011, Marco Antonio went to Lima and hid there for a month, during which time he received an invitation to participate in a marathon competition in Puerto Rico, United States. Marco Antonio alleges that he considered this an opportunity to escape. He travelled to the United Stated on February 25, 2010 and went to Vive la Casa on March 10, 2010 in hopes of seeking asylum from Canada. Although he was told he did not qualify because he had no relatives in Canada he ran for three hours in order to cross into Quebec. He then travelled to Toronto from Montreal and filed an application for refugee status on March 24, 2010.

Decision under Review

[9] The panel was of the view that several aspects of the applicants' narrative lacked credibility, namely as it related to their failure to claim refugee status in the United States and as it related to the availability of an Internal Flight Alternative [IFA] for them in Lima. The panel further concluded that the applicants had not succeeded in rebutting the presumption that the Peruvian police were able to ensure their protection as such protection was never sought.

Failure to claim elsewhere

[10] The panel first noted that failure to claim refugee protection from a country within which the claimant resided or even sojourned or travelled before coming to Canada, when that country is a signatory of the Refugee Convention, can be seen to negate the claimant's subjective fear of persecution. The panel also noted that lack of evidence going to the subjective element of the claim is in itself sufficient for the claim to fail, even when there is evidence that an objective basis for the fear does exist.

[11] The panel found that in this case, both applicants had the opportunity to seek asylum in the United States or, at the very least, to seek information from official government sources regarding the process to seek asylum in the United States, but they did not do so. Wilder lived in the United States for nearly four and a half years without legal status and without ever making any enquiries or efforts to regularize his status. The panel found Wilder's explanation that he was unaware of the possibility that he could claim refugee status in the United States because he did not speak English was unsatisfactory and unreasonable in light of the fact that he left New York for New Jersey immediately after he finished his marathon in 2005. According to Wilder's testimony, some Spanish speaking people he had met in New York told him how to get to New Jersey, but he did not trust them enough to tell them his story.

[12] The panel also found improbable Marco Antonio's contention that while he was in Buffalo from February 25 to March 10, 2010, he was not told anything about the asylum process in the United States, but only about the process in Canada; all the more so that he left Peru in hopes of seeking protection in the United States.

Availability of an Internal Flight Alternative

[13] Both Marco Antonio and Wilder testified that they fled to Lima once they were threatened by the Shining Path on January 10, 2010 and October 20, 2005 respectively. They stated that it was because they were living in hiding that they were safe in Lima. However, the panel found the applicants not to be credible on that issue.

[14] The applicants alleged that an IFA in Lima was not appropriate because members of the Shining Path are able to trace them anywhere in the country. However, the panel noted that according to his PIF narrative and testimony, Marco Antonio was under routine training in a stadium in Lima from January 16 to February 25, 2010, which suggests that on a balance of probabilities, if the Shinning Path were after him, he would have been located in Lima.

[15] The applicants' previous move to Lima also raised credibility concerns for the panel. The panel questioned the plausibility of the claim that both applicants were approached, five years apart from the other, shortly before their trips to the United States, to run in marathons and they both went to Lima just after they were allegedly threatened, where they stayed less than a month. Upon questioning as to when they became aware that they would be going to an international competition, Marco Antonio became very evasive and finally mentioned that it was a week after he went to Lima that he was advised of the trip to the United States. Wilder, on the other hand, replied that he learned about his selection two and a half month before departing for the United States, while he only stayed in Lima for ten days.

[16] The panel stated that on a balance of probabilities both applicants would have been given at least a couple months notice of their selection and concluded that Marco Antonio's move to Lima was for training and monitoring purposes and not because of the threats allegedly made against him. Accordingly, the panel found that the applicants were attempting to embellish their claim by contending that they fled from Huancayo to avoid extortion and save their lives.

[17] Applying the two-pronged IFA test established by the Federal Court of Appeal in *Thirunavukkarasu v Canada (Minister of Citizenship and Immigration)*, [1994] 1 FC 589 (FCA) and *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (FCA), the panel stated that no persuasive evidence was put before it to suggest that either of the applicants were being pursued by the Shining Path or that the latter retained any interest in them. Notably, no evidence was provided to the panel to indicate that the applicants' family members, including the principal applicant's wife and daughter, were being subject to harassment by Shining Path members.

[18] Also, in view of the objective documentary evidence, the panel found that Shining Path members do not have any sort of an elevated profile in terms of any contacts or influence over the police or the government of Peru. Their activities are now rather limited to the traffic of drugs through corporate means. The panel concluded that, on a balance of probabilities, the agents of persecution could not locate the applicants in Peru if they were to move to Lima.

[19] Finally, the panel found that considering the age of the applicants and their notoriety as national sports figures of some international stature, it is not unduly harsh to expect them to move within Peru, namely to Lima, before seeking refuge in Canada.

Other Credibility Issues

[20] Other major concerns noted in the panel's findings seriously undermined the applicants' credibility:

- A death certificate and a police report were produced in evidence of the death of the applicants' older brother. However, the panel found that this evidence said nothing of their older brother being kidnapped and killed by the Shining Path. The panel rejected the applicants' testimony that they were unable to get a copy of their father's denunciation to the police about the home invasion and kidnapping of his son because the police station was later destroyed in a terrorist attack. The panel noted that the applicants were able to obtain proof of their brother's death but no proof of the denunciation; which led the panel to conclude that, on a balance of probabilities, no such denunciation was ever made because none of the alleged events had taken place.
- The panel found a contradiction between Marco Antonio's oral and written testimony with respect to the report he filed with the police in January 2010: while the applicant testified that the police told him to come back if something happened to him again, the PIF narrative mentioned that the applicant was told not to come back to the police because they could not offer any help.
- The applicants were unable to provide a reasonable explanation for why the January 2010 police report stated that "this certificate is issued by the request of the interested party for legal purposes." The panel noted that given Marco Antonio's inconsistent testimony and the finding that he was knowingly leaving his hometown to eventually go to the United States, as well as the fact that according to the record the principal applicant has made two unsuccessful attempts to come to Canada in the past, there is the basis to conclude on a balance of probabilities that the applicant's complaint was baseless and the police report was sought in an effort to support a refugee claim in Canada.

- Although Edgar's death could have occurred as a result of a terrorist act, the panel found it implausible that once Wilder left the Country (fourteen years after Edgar's death), it took five years for members of the Shining Path to locate Marco Antonio and demand Wilder's outstanding payment, in spite of the fact that Marco Antonio continued to reside at the same place.

[21] The panel went on to conclude that even if the applicants have encountered problems with a terrorist group, both an IFA and state protection would be available for them.

Failure to Seek State Protection

[22] The panel reiterated that Wilder made no efforts whatsoever to seek police protection after the alleged extortion demands from the Shining Path and that Marco Antonio filed a denunciation but did not give the police sufficient time to conduct its investigation, as he immediately left without following up on his complaint. Not only there was no evidence to suggest that police were not making genuine and earnest efforts to investigate the principal applicant's allegations and apprehend the perpetrators, but also his choice to leave the country within a few weeks may have resulted in the investigation being delayed or stymied given that he was the key witness.

[23] In view of the circumstances and considering the objective documentary evidence that the Peruvian government is taking active action against the Shining Path, the panel found that the applicants had failed to provide clear and convincing evidence to establish their state's inability to protect them. The burden was on them to do so.

[24] To conclude, the panel found that there is not a serious possibility that the applicants would be persecuted upon their return to Peru, nor that they would be personally subjected to a risk to their lives, a risk of cruel or unusual treatment or punishment, or a danger of torture, on a balance of probabilities. Accordingly, their claims were both rejected.

Issues and Applicable Standard of Review

[25] Three issues are raised in this application for judicial review:

1) Did the panel err in its assessment of the principal applicant's failure to seek asylum in the United States?

2) Did the panel misapprehend and speculate in reaching its credibility findings in relation to the issue of IFA?

3) Did the panel err in its assessment of the issue of state protection?

[26] The parties agree that it is the standard of reasonableness that applies to all of the above issues as they raise questions of fact or of mixed fact and law. Accordingly, if the decision falls "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" it shall not be set aside : *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339.

[27] The respondent underlines that a "high standard of review has consistently been held to apply to decisions of the Refugee Protection Division concerning findings of fact or of credibility in the context of claims under sections 96 and 97 of the Act" (*Ren v Canada (Minister of Citizenship and Immigration)*, 2009 FC 973 at para 13, [2009] FCJ 1181); "the very essence of deference [being] that the Court will not substitute its view of the evidence or apply its own weight to the

testimony where there is a reasonably based Board's conclusion" (*Huseynova v Canada (Minister of Citizenship and Immigration)*, 2011 FC 408 at para 11, [2011] FCJ 527). It is also established that "a negative finding regarding subjective fear may render the assessment of the objective aspect of the complaint superfluous and may in itself warrant the dismissal of the claim" (*Ahoua v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1239 at para 16, [2007] FCJ 1620).

Review of the Impugned Decision

[28] The applicants take issue with portions of the panel's finding and not with its entire reasoning. As stated above, I find none of their arguments justify the Court's intervention.

No reviewable error in the assessment of the principal applicant's failure to seek asylum in the United States

[29] The principal applicant alleges that he only stayed in the United States for two weeks and his stay there was akin to a transit stop on his way to Canada. He also alleges that the explanation he provided in this respect was a strong one: he sought advice within a short period of his arrival and was told to go to Vive la Casa in Buffalo, which he did. This, according to the principal applicant, constitutes a reasonable explanation given the fact that he did not speak English and had to seek information in a prompt fashion.

[30] The applicants have cited case law (notably, *Raveendran v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 49; [2003] FCJ 116 [*Raveendran*]) to argue that the panel should have inquired into principal applicant's personal circumstances in order to determine whether, in fact,

there was a reasonable opportunity for him to claim refugee protection elsewhere. In *Raveendran*, at paras 58-59, the Court stated:

> The panel, in its discussion of the decision of the applicants not to claim refugee protection in the United States and the advice on which that claim was based, mentioned only that the applicant had spoken with counsel. The panel stated that she "may have received that advice or may not have". The panel went on to state that it expects that a refugee would take "every reasonable opportunity" to seek international protection.
>
> In my view, a subjective determination of what constitutes a reasonable opportunity is appropriate in this case. The principal applicant understood, based on the advice that she claims to have received from other refugees and church workers, that there was a chain of causality between making a claim for asylum in the United States and being sent back to Sri Lanka, where her fears of torture and mistreatment could materialize. This explanation with the other elements already mentioned by the applicant satisfies me that she had a well-founded fear of persecution by being returned to Sri Lanka.

[31] The jurisprudence is clear that a delay in making a refugee claim is related to the existence of a subjective fear of persecution, the essential element of a claim (*Espinosa v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324 at para 21, [2003] FCJ 1680). The *Raveendran* case should not be read as suggesting that any postponement of a refugee claim is justified insofar as the claimant followed someone else's advice in a foreign country, just as it "does not stand for a blanket proposition that a fear of deportation to persecution is a valid reason in every case for not claiming asylum in the United States. Such an argument will be decided on the circumstances of each case" (*Shah v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1711 at par 36, [2005] FCJ 2131). Furthermore, the principal applicant has not established that the Board failed to consider his explanations which he reiterates in this application for judicial review and the Court is not prepared to reassess his evidence.

[32] I agree with the respondent that while the principal applicant's claim could not be rejected solely on this basis, the panel could reasonably take this factor into consideration where the applicant failed to make any inquiries into the process in place in the United States, despite allegedly going there in hopes of seeking protection. As this finding was supported by other credibility issues which also undermined the principal applicant's subjective fear, there is no basis for holding that the panel committed a reviewable error in this regard.

No unreasonable credibility findings in relation to the IFA

[33] The applicants assert that the findings of the panel regarding the IFA are based solely on speculation and conjecture rather than on the relevant evidence. More specifically, they submit that regarding the lack of police report concerning the 1991 kidnapping and murder of Edgar, the panel disregarded the situation of Peru and the fact that the rural area of Huancayo was under attack by the Shining Path at the time; hence the claim that no proper records remain of that incident.

[34] However, if read in its context, the panel's finding, although not the only conclusion it could have reasonably reached, nonetheless falls within the realm of reasonable outcomes. The panel questioned the fact that the applicants were able to provide both a police report regarding the death of their brother and a death certificate from the police station that they alleged was destroyed in terrorist attacks. The applicants were unable to clarify at the hearing the reason why their father's denunciation (which incidentally was the only document reporting the circumstances of the incident) was also the only missing document. In this context, the Court finds the panel's finding to fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[35] The applicants further cite *Sabaratnam v Canada (Minister of Employment and Immigration)*, [1992] FCJ 901 (FCA), in which the Federal Court of Appeal essentially held that the fact that an individual had to remain in hiding to avoid problems and successfully managed to do so is not evidence of an IFA or a lack of objective basis of fear. Accordingly, they argue that the panel made incorrect and perverse findings on the likelihood for them to be relocated by the Shining Path elsewhere in Peru.

[36] The applicants seem to suggest that the panel erred in finding that the Shining Path could not relocate them in Peru simply because they managed to hide for a certain period of time in Lima. As I read the panel's reasoning in its entirety, this argument is clearly unfounded. First, as the respondent notes, the panel reasonably found that the applicants were not hiding in Lima and that their move to Lima was in preparation for an upcoming marathon in the United States. Second, the panel's finding with respect to the objective basis of the applicant's fear was not solely based on the fact that they lived safely in Lima but, more fundamentally, that there was no evidence before the panel to support the allegation that the Shining Path continued to pursue the applicants or would be interested in them now. On the contrary, the evidence tends to demonstrate that they were not seriously after the applicants. The incident upon which Wilder bases his claim allegedly occurred fourteen years after Edgar's death, whereas the incident upon which the principal applicant bases his claim allegedly occurred close to twenty years after Edgar's death and five years after Wilder's departure from Peru, in spite of the fact that the principal claimant continued to reside at the same place. On the issue of the burden of proof, I concur with Justice Gibson's comments in *Khan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1183 at para 18, [2006] FCJ 1481, where he stated:

> With great respect to the Applicant, I am satisfied that it is clear beyond question that, despite what may transpire at the opening of a hearing when the range of issues before the RPD is discussed, the legal duty or onus remains on a claimant to make out his or her claim in clear and unmistakeable terms. The transcript of the hearing before the RPD clearly discloses that the "agents of persecution today" was an issue before the RPD relating to the objective component of the claimants' claim. The issues before the RPD were not narrowed. More specifically, the issue of "agents of persecution today" was not withdrawn. As stated in paragraph 11 of the reasons for decision in Ranganathan:
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> > ... A failure by a claimant to fulfill his obligations and assume his burden of proof cannot be ... imputed to the Board so as to make it a Board's failure.

No reviewable error in the assessment of the issue of state protection

[37] The applicants submit that the panel failed to consider the verbal answer that was given to Marco Antonio at the police station, namely that the police cannot help him and that if further problem occurs he should not return to them. The applicants contend that it was unreasonable for the panel to conclude that they could be given adequate protection despite this evidence.

[38] Yet the panel did consider the principal applicant testimony at several points in its written reasons. Aside from the contradictions the testimony contained with regards to what the police exactly told him that day and the fact that he did not await for his complaint to be duly investigated, the panel found that other recourses, such as the Public Ministry and the Ombudsman, were still available to the principal applicant. Again, I find that the applicants take issue with portions of the panel's reasons without reading them in context.

[39] Regarding the objective documentary evidence considered by the panel, the applicants submit that according to the jurisprudence, the state's willingness to address a particular situation (*Balogh v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 809 at para 37, [2002] FCJ 1080) or mere police investigation and prosecution (*Alli v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 479 at para 20, [2002] FCJ 621) cannot be equated with adequate state protection. In my view, this argument is also unfounded in circumstances where, contrary to the cases they have referred to, the principal applicant immediately left the country without allowing the state enough time to look into his complaint.

[40] The applicants also submit that the panel erred in its analysis of state protection by failing to consider the totality of the evidence and preferring one excerpt of the documentary evidence over others. However, the applicants make no further submission to establish that the panel conducted a selective reading of the documentary evidence; they do not specify which documents have been overlooked or misconstrued. A bare assertion that the panel failed to consider the totality of the evidence is insufficient as it does not enable the Court to conduct a more detailed review.

[41] For all of the above reasons this application for judicial review is dismissed. No questions were proposed for certification and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

a. The application for judicial review is dismissed.

b. There is no question for certification.

« Jocelyne Gagné »

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-761-12**
STYLE OF CAUSE:	**MARCO ANTONIO ROMERO DAVILA WILDER ROMERO DAVILA v MCI**
PLACE OF HEARING:	Toronto
DATE OF HEARING:	September 11, 2012
REASONS FOR JUDGMENT:	GAGNÉ J.
DATED:	September 25, 2012

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