Federal Court Cour fédérale

Date: 20130614

Docket: IMM-10867-12

Citation: 2013 FC 651

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 14, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

TORNER ALVARADO, XIMENA
TORNER ALVARADO, RAFAEL JOSE

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The applicants are seeking judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board dated September 26, 2012, wherein the RPD determined that the applicants were neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

II. Facts

[2] The principal applicant, Rafael Jose Torner Alvarado, and his sister, Ximena Torner Alvarado, are Mexican citizens.

[3] In the Personal Information Form [PIF] submitted in support of his refugee claim, the principal applicant alleges the following facts.

[4] The principal applicant's problems began on or about October 12, 2007, following a police raid on a bar where he had been working since September 2007. The raid was the result of an anonymous tip that an illegal sale of drugs had taken place in the bar and that alcoholic drinks were being sold to minors. During the search, the police found drugs in the bar. They also arrested 37 minors and 14 employees, including the principal applicant.

[5] On October 14, 2007, the principal applicant was released after spending 48 hours in custody. However, the principal applicant claims that his rights were not respected during the detention, that he did not have the right to call his family until six hours after his arrest and that all the other employees remained in detention when he was released through the services of a lawyer retained by his family.

[6] On September 24, 2007, the principal applicant received a summons to appear as a witness. A few days later, the principal applicant received calls from unknown individuals threatening to kill

him if he attended court to testify. According to the principal applicant, his lawyer advised him to not appear and to leave Mexico.

[7] On November 26, 2007, three strangers stopped the principal applicant while he was returning home with his sister after a visit to a psychologist. The men struck him and threatened to kill the principal applicant, but they let him go when his sister threatened to call the police. The applicants produced in evidence a certificate of the psychologist whom they met with prior to the incident and proof of a medical appointment they attended following the incident.

[8] The principal applicant did not, however, go to the police to make a statement or file a complaint because he was afraid he would be arrested again at the public ministry. According to the principal applicant, his lawyer advised him not to do it. Moreover, the principal applicant alleges that he feared the authorities who he believed had colluded with the owners of the bar to have him arrested.

[9] After this incident, the applicants took refuge at their uncle's home in Tabasco. They claim that their persecutors traced them there.

[10] The applicants arrived in Canada on December 17, 2007. More than two months later, on February 26, 2008, they filed a refugee claim, which was rejected by the RPD.

III. Decision that is the subject of this judicial review

[11] The RPD correctly noted that the applicants' refugee claim had to be examined solely on the basis of paragraph 97(1)(b) of the *IRPA* because the jurisprudence is unequivocal that victims of crime are not considered a particular social group under section 96 of the *IRPA* where it has not been demonstrated that the state is involved in the harm feared.

[12] The principal findings that the RPD relied on in rejecting the applicants' refugee claim were credibility, the applicants' lack of subjective fear and their failure to request state protection.

[13] The RPD generally accepted that the events alleged by the applicants were true, but, on a balance of probabilities, it was not satisfied

a. that the Mexican authorities had colluded with the owners of the bar to pursue and arrest the applicant;
b. that the court was prepared to act in favour of the bar owners in exchange for a sum of money; or
c. that political interests had been at play because during the last elections for mayor of Mexico City, where the applicants lived, one of the candidates promised to [TRANSLATION] "clean up the bars".

[14] The RPD correctly stated that the failure to seize the first opportunity to ask for protection may be a factor to consider in assessing the applicants' claim that their life and safety were in danger although it is not determinative in itself. The RPD therefore drew a negative inference

regarding the applicants' subjective fear because they waited more than two months after their arrival in Canada to request protection.

[15] With respect to the applicants' failure to seek state protection, the RPD stated that the applicants' simple assertion that political interests were at play and that the bar owners themselves were not arrested because they were benefitting from the collusion of police or judicial authorities, or their suspicion that their assailants during the incident of November 26, 2008, were police officers, were not sufficient to establish that the Mexican state was incapable of providing them with the adequate protection they need.

[16] The RPD found that the applicants did not succeed in rebutting the presumption of state protection as defined in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 because the principal applicant chose not to disclose the persecution he was being subjected to and even refused to appear in court to testify.

[17] Moreover, the RPD noted that the fact that the applicant was released through the intervention of a lawyer retained by his family suggested that, if there were subsequent problems, the applicants had resources to assist them in seeking protection and that it would probably be granted.

[18] Finally, the RPD found that, if returned to Mexico, the principal applicant would no longer risk being inconvenienced because of incidents that occurred more than five years ago since his mother, who still lives in Mexico City, has had no such problem since the applicants left.

IV. Issues

[19] (1) Did the RPD err in its assessment of the applicants' credibility?

(2) Did the RPD err in its analysis of state protection in the applicants' case?

V. Analysis

[20] The applicants' arguments stem essentially from the fact that, according to them, the RPD ignored a letter from the principal applicant's counsel, Mr. Curevo Shuy, that had been introduced in evidence to support their allegations. For clarity, the pertinent excerpts of this evidence read as follows:

> As lawyer of the mentioned, and upon the broken penal system that rules out country, regretably corrupt and inefficient, I suggested him to leave national territory, since it had been proved once again that the authorities would act on his detriment, borderline or against the law. His case would not have penal certainty; he would be deprived from his right to a hearing, from presenting proof in his favour and from the guarantee of due process.
> For that reason, and upon imminent execution of arbitrary and illegal acts from the authority against Rafael, it was highly suggested that he left the country, because we were upon a case in which there were many interests at stake since the authorities and the owners of the [bar] had reciprocal ties of corruption and if my client showed up to testify, it would generate a series of deep political and economical consequences for them.
>
> . . .
>
> Upon the death threats received by Rafael and his sister Ximena, we were able to recognize that he was, involuntarily, involved in a triangle of organized crime, corrupt authorities and drug trafficking, AND THIS PREVENTED TO MAKE A FORMAL COMPLAINT TO THE AUTHORITIES. This was the mayor enough motive why, for the sake of protecting the life of the mentioned that I, as a professional in the matter, took the decision of asking his parents to analyse the possibility of sending him out of the country, now with his sister, this way SAVING THEIR LIVES, supreme value of humanity. In Mexico, a death threat is, without a doubt, a sure and regrettable truth.

> TO CONCLUDE, I HIGHLIGHT THE FACT THAT I WAS FORCED TO WITHDRAW FROM THE TORNER ALVARADO'S CASE, DUE TO THE FACT THAT WHEN I WENT TO FILE FOR A COPY OF THE CRIMINAL PROCEEDINGS OF THE CASE, I WAS VIOLENTLY ASSAULTED AND WAS THREATENED TO DEATH, BY UNKNOWN PEOPLE TO ME, SO I HAD NO OTHER CHOICE, FOR THE SAKE OF PROTECTING MY INTEGRITY AND THE ONE OF MY FAMILY, TO WITHDRAW FROM THE MENTIONED CASE.

(Applicant's record at pp 24-26).

[21] It is true that the RPD did not mention this letter in its reasons. It is also true that the more or less relevant facts attested to by counsel for the applicants in his letter contradict the RPD's findings with respect to both the applicants' credibility and the issue of the adequacy of state protection that they can hope to benefit from. However, in the circumstances of this case, the Court is not prepared to infer from the RPD's silence that it "made an erroneous finding of fact 'without regard to the evidence'" within the meaning of *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 (at para 17), and the principle that the "burden of explanation increases with the relevance of the evidence in question to the disputed facts [and that] a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact."

[22] First, it should be noted that, according to the consistent jurisprudence of this Court and of the Federal Court of Appeal, the RPD is assumed to have considered all the evidence in the record and is not required to comment on each piece of evidence in its reasons (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (QL/Lexis) (FCA)). Also, according to *Aguebor v Canada ((Minister of Employment and Immigration)*, [1993] FCJ No 732 (QL/Lexis)

(FCA), assessing the evidence and the probative value assigned to it falls within the RPD's jurisdiction, not the Court's.

[23] Second, it would be simply unreasonable, when this evidence is examined in the context as it must be, to give the comments made by applicants' counsel the importance that justifies applying the principle laid down in *Cepeda-Gutierrez*, above. All the facts that counsel for the applicants attested to, to the best of his knowledge, were also alleged by the applicants themselves, and indirectly analyzed by the RPD. As Justice Sean Harrington stated in *Gomez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 859, "corroboration does not make an incredible story credible." The same is true for the letter from applicants' counselts, Carillo Estrada, who essentially states in his letter that the principal applicant's persecutors will be able to find him if he were returned to Mexico and that his sister could also be kidnapped or prosecuted.

[24] Having reviewed the evidence in the record and the parties' representations, the Court has reached the conclusion that the RPD's findings with respect to the applicants' failure to rebut the presumption of state protection by their inaction, as well as the complete lack of evidence to corroborate their doubts about collusion between the Mexican authorities and the bar owners are entirely reasonable within the meaning of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 (at para 47). It is difficult to see why it was necessary that the RPD explicitly quote the comments of counsel for the applicants, which are essentially identical to their own allegations and explain why it did not assign any weight to this evidence. The principle established in *Cepeda-Gutierrez*, above, is a crucial principle to ensure the fair assessment of all the relevant

evidence presented in support of a refugee claim and should not be reduced to a mere technical requirement.

VI. Conclusion

[25] For all the foregoing reasons, the applicants' application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that the applicants' application for judicial review is dismissed with no question of general importance to certify.

"Michel M.J. Shore"

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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