Federal Court  Cour fédérale

Date: 20150814

Docket: IMM-5184-14

Citation: 2015 FC 972

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, August 14, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

JUAN PABLO GALVAN RODRIGUEZ
SAMANTHA CAMACHO FLORES
JUAN PABLO ALVAN CAMACHO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Introduction

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), of a decision dated May 28, 2014, of the

Refugee Protection Division of the Immigration and Refugee Board of Canada (the RPD) finding that the applicants are neither "Convention refugees" nor "persons in need of protection" under sections 96 and 97 of the Act.

II. Background

[1] The principal applicant, Juan Pablo Galvan Rodriguez (Mr. Rodriguez), his wife, Samantha Camacho Flores and their minor son, Juan Pablo Galvan Camacho, are all three citizens of Mexico. They fled to Canada from Mexico on September 24, 2008, and filed a claim for refugee protection in Canada as soon as they arrived in the country (claim for refugee protection).

[2] They based their claim on incidents involving Mr. Rodriguez, who was a member of the Mexican army when he left for Canada. Mr. Rodriguez was particularly charged with combating organized crime. In this capacity, he was involved in gun and drug seizures and provided information for trapping traffickers.

[3] On August 22, 2008, while on leave and on his way home, Mr. Rodriguez was stopped by a group of armed men in a vehicle. The men insinuated that he spoke too much and that from now on he had best cooperate with them, or he would be putting himself, his wife and his son in danger, by providing them with all information that could be considered useful to them regarding future operations by the army against organized crime groups.

[4] When he arrived home, Mr. Rodriguez told his wife about the incident and came to the conclusion that he had been set up by a colleague. The next day, he and his family went into hiding at an uncle's home. While staying with this uncle, his sister informed him that she had seen a car in front of her house. A few days later, on August 31, 2008, Mr. Rodriguez and his wife, after contacting a sister-in-law living in Canada, took steps to obtain passports and plane tickets for Canada. As mentioned earlier, Mr. Rodriguez and his family left Mexico for Canada on September 24, 2008, and until that date they remained in hiding and Mr. Rodriguez did not report to his command unit.

[5] In support of his claim for refugee protection, Mr. Rodriguez stated that he feared the individuals he suspected of being drug traffickers working for the Gulf Cartel who stopped him and threatened him and his family. He stated that he also feared reprisals from Mexican military authorities as he expects to be considered a deserter upon his return to Mexico. He believes that as a deserter, he faces eight years of imprisonment given that he has since left Mexico and that he kept military equipment with him.

[6] Although it found Mr. Rodriguez's story credible, the RPD nevertheless concluded that he had not established, on a balance of probabilities, that he and his family would be targeted by those individuals if they were to return to Mexico today. It came to that conclusion on the basis of

1. the time that elapsed since the events that led the applicants to leave Mexico;
2. the fact that by no longer being in the army, Mr. Rodriguez is of less interest to drug traffickers as he is no longer in a position to provide them with useful information; and

3. the fact that his family members, such as his two brothers and Mr. Rodriguez's mother, are still in Mexico residing in a house adjacent to that of the applicants and have not been harassed by the drug traffickers since the events took place.

[7] As for the fear related to the consequences of Mr. Rodriguez's desertion, the RPD first found that to the extent that he acknowledged that his desertion resulted not from the fact that he was a conscientious objector, but rather from threats from drug traffickers, the claim for refugee protection had no nexus to the grounds of protection contemplated by section 96 of the Act. In other words, in the RPD's view, Mr. Rodriguez had not demonstrated that he would receive a disproportionate sentence for his desertion owing to his race, religion, nationality, political opinion or membership in a particular social group.

[8] The RPD then found that this fear did not allow the application of section 97 of the Act either. It first noted, in that regard, that in the absence of information as to whether Mr. Rodriguez could request a reduction in his sentence, by arguing, for instance, that his desertion was the result of threats from drug traffickers, it considered that he would receive an eight-year prison sentence if he were to return to Mexico. It subsequently took the position that this term of imprisonment was not disproportionate to international standards while noting that in Canada, the courts had deemed that a prison sentence of five years for desertion was not excessive. The RPD then found, based on the documentary evidence, that detention conditions in Mexican military prisons, including the one where Mr. Rodriguez was expected to serve his time, were good, as said prisons are considered to be an extension of military camps.

[9] The RPD also rejected the argument that, if imprisoned, Mr. Rodriguez's safety would be compromised because military authorities would suspect him of having co-operated with drug traffickers after his desertion or because by being in collusion, said authorities and drug traffickers would take advantage of his presence in prison to eliminate him. It also did not accept Mr. Rodriguez's argument based on a possible transfer to a civilian prison where detention conditions are more difficult.

[10] Finally, the RPD rejected the applicants' claim that Mr. Rodriguez would not have access to fair and transparent justice owing to the corruption in the civilian justice system in Mexico to the extent that, as it had already determined, it did not believe that Mr. Rodriguez would garner the interest of drug traffickers in that they would attempt to negatively interfere with an eventual trial.

III. Issues

[11] The issue here is whether, in making its findings, the RPD committed an error warranting the intervention of this Court.

[12] The parties agree that the applicable standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190). Under this standard of review, the Court must show deference to the conclusions drawn by the RPD and will therefore intervene only if those conclusions lack justification, transparency and intelligibility and fall outside a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 72; *Hinzman v Canada (Minister of Citizenship and Immigration)*; *Hughey v Canada (Minister of Citizenship and Immigration)* [*Hinzman*], 2007 FCA 171, at para 38).

IV. Analysis

A. *Fear of drug traffickers*

[13] The applicants did not persuade me that there is reason to intervene on this point. It is trite law that the prospective nature of the risk advanced to support a claim for refugee protection is a central element of the right to protection under section 97 of the Act (*Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678, [2014] 1 FCR 295, at para 40). Indeed, the applicants, as specified by the RPD, had to establish not only that they had been targeted by drug traffickers prior to leaving Mexico, but also that they would likely be targeted if they were to return to that country. In other words, they also had to demonstrate that the threat against them is prospective (*Acosta v The Minister of Citizenship and Immigration*, 2009 FC 213, at para 13; *Gonzalez v The Minister of Citizenship and Immigration*, 2013 FC 426, at para 18; *Mancillas v The Minister of Citizenship and Immigration*, 2014 FC 116, at para 25).

[14] In this case, the applicants criticize the RPD for not adequately considering the fact that Mr. Rodriguez was identified, targeted and threatened by drug traffickers and that cartel violence is well known and documented. However, the RPD also took into account, as noted earlier, the passage of time, the fact that the drug traffickers' interest in Mr. Rodriguez had necessarily waned since he was no longer in a position to provide them with useful information and the applicants' family members who are still living in Mexico had not been harassed since the applicants' departure.

[15] Ultimately, the applicants' argument is essentially that the RPD should have preferred certain evidence over other evidence. The Court's role is not to reweigh the evidence and substitute its own factual findings for those of the RPD. As I mentioned earlier, the Court must rather show deference to the RPD's findings of fact and only intervene where they were made in a perverse or capricious manner or without regard for the material before the RPD. In other words, the question is not whether a reweighing of the evidence could lead to a different outcome, but rather whether the fact of not giving predominant weight to certain evidence undermined the reasonableness of the RPD's decision (*Khosa*, above, at para 72; *Idony v Canada (Minister of Citizenship and Immigration)*, 2010 FC 970, at para 13; *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319).

[16] In my view, the RPD had sufficient evidence to conclude as it did with respect to the central issue of the prospective nature of the risk alleged by the applicants. Its conclusions, on that point, fall within a range of possible, acceptable outcomes in respect of the facts and law.

[17] This first ground is dismissed.

B. ***Fear related to the consequences of desertion***

[18] It is on this point that the applicants focused their effort both in their memorandum and at the hearing. It was however at the hearing that they indicated, at the outset, that their argument in that regard only concerned section 97 of the Act.

[19] To be recognized as persons in need of protection under section 97 of the Act, refugee protection claimants must show, on a balance of probabilities, that their removal to their country of origin would subject them to a risk to their life or to a risk of cruel and unusual treatment or punishment. To that end, they must rebut the presumption that absent a situation of complete breakdown of state apparatus, the state will be capable of protecting the claimant (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689, at page 725).

[20] They must also, if necessary, that is where, as here, the alleged risk is based on the effects of a law that would not be in their favour upon their return to their country of origin, rebut the presumption of neutrality and validity of laws of general application (*Zolfagharkhani v Canada (Minister of Employment and Immigration)*, [1993] 3 FCR 540, 1993 CanLII 2971 (FCA), at page 15).

[21] In the case at bar, the applicants argue that the question of whether Mr. Rodriguez's removal to Mexico would subject him to a risk to his life or cruel and unusual treatment or punishment, owing to the legal consequences of his desertion, must be analyzed on the basis of three factors: the disproportionate nature, compared to international standards, of the sentence

that he would be facing if he were found guilty of desertion, the detention conditions in Mexican military prisons and the quality of the Mexican judicial system.

(1) Disproportionate nature of the sentence

[22] The applicants feel that an eight-year prison sentence is disproportionate to the offence of desertion. They cite as an example the French and American prison sentences, which are, three and five years, respectively. They also rely on *Hinzman*, above, where the Federal Court of Appeal noted that 94% of American deserters do not generally face prosecution or imprisonment (*Hinzman*, at para 58), and on the fact that, according to the evidence, US soldiers who refused to participate in the war in Iraq were only sentenced to 15 months' imprisonment.

[23] I am not persuaded by this argument. It neither settles the question of the presumption of validity and neutrality of laws of general application nor that of compliance of the sentence with international standards. It must be reiterated here that in both respects, the onus is on the applicants (*Zolfagharkhani*, above, at page 15). In the absence of evidence to the contrary, one must first presume that the Mexican law providing a term of imprisonment of eight years for the offence of desertion, when the deserter also left the country and did not hand over all of his military equipment, is valid.

[24] As regards the compliance of the eight-year prison sentence with international standards, the evidence appears to be clearly insufficient to found a claim of unreasonableness against the RPD: the sampling of comparative law is thin, to say the least; there is very little information available regarding the sentencing regime applicable to military offences in Mexico; notably, it is

unknown whether the applicant could request and obtain a reduction in sentence by arguing, as the RPD stated in its decision, that his desertion was owing to threats from drug traffickers. Moreover, *Hinzman*, above, does not directly address the disproportionate nature of the prison sentence prescribed for US deserters and certainly cannot be interpreted as the authority on the excessiveness of sentences of five years' imprisonment or more in desertion matters.

[25] The possible imprisonment of deserters upon their return to their country of origin is generally not sufficient to meet the requirements of sections 96 and 97 of the Act (*Ates v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 322). The onus was on the applicants to establish that the sentence Mr. Rodriguez would be facing upon his return to Mexico, albeit harsh, is disproportionate when compared to the practice of other States. In my view, they failed to do so, and therefore, the RPD cannot be faulted, when its decision is reviewed on a standard of reasonableness, for also coming to that conclusion.

(2) Detention conditions in Mexican military prisons

[26] The applicants acknowledge that they did not have any evidence to counter the evidence the RPD relied upon to conclude that the detention conditions in Mexican military prisons are good. They however find it curious that such is the case in military prisons given the situation of inmates in civilian prisons.

[27] This argument, obviously, is purely speculative. It invites us to extrapolate and to do so in a context in which the evidence in the record is contrary to the assumption made regarding the situation prevailing in military prisons. It cannot, therefore, be accepted.

(3) Considerations related to the Mexican judicial system

[28] The applicants argue here that the RPD erred by ignoring documentary evidence demonstrating the problems of corruption and inefficiency in the Mexican judicial system which entitle Mr. Rodriguez not to trust Mexican courts and to fear he will not have access to fair and transparent justice if tried for desertion.

[29] Again, there is no specific evidence in the record on the state or quality of the military justice system in Mexico. The argument invites us to draw conclusions based on evidence of an institutional apparatus of the same nature, but distinct.

[30] In *Canada (Minister of Employment and Immigration) v Satiacum* (FCA), [1989] FCJ No 505 (QL), the Federal Court of Appeal noted that in the absence of exceptional circumstances established by the claimant, one must assume a fair and independent judicial process in the foreign country. I see no reason in principle why the same would not be true for the military judicial process. In this case, this was not proven.

[31] The applicants submit, however, that the documentary evidence shows that the army is involved in serious abuses and that impunity and corruption remain serious problems. They therefore fear that the drug traffickers will intervene with military authorities to influence the course of his desertion trial. However, the RPD considered this argument and came to the conclusion that there is no reason to believe that Mr. Rodriguez would be of interest to drug traffickers upon his return to Mexico to the extent that they would deem it necessary to make such interventions.

[32] In light of the evidence in the record, I cannot say that the RPD's findings on this point fall outside a range of possible, acceptable outcomes in respect of the facts and the law. Mr. Rodriguez does not appear to me to have the profile of a person who, still today, continues to be of interest to drug traffickers.

[33] In short, the applicants did not meet the burden of proof, incumbent upon them, to establish, on a balance of probabilities, that the removal of Mr. Rodriguez to his country of origin would subject him to a risk to his life, or a risk of cruel and unusual treatment or punishment owing to his desertion from the army: the evidence as to the possibly disproportionate nature of the sentence he could face if convicted is fragmentary, that regarding detention conditions in Mexican military prisons is not in their favour and that relating to the quality of the Mexican judicial system does not address military justice. In other words, the evidence in the record and the applicable presumptions provided the RPD with options, within a range of possible and acceptable outcomes, other than that of agreeing with the applicants on this point.

[34] This second ground is also dismissed as is, accordingly, this application for judicial review.

[35] Neither party requested the certification of a question to the Federal Court of Appeal pursuant to paragraph 74(d) of the Act. Nor do I see any question for certification in this case.

ORDER

THE COURT ORDERS that:

1. The application for judicial review is dismissed;

2. There is no question to certify.

"René LeBlanc"

Judge

Certified true translation
Daniela Guglietta, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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