Federal Court  Cour fédérale

Date: 20130822

Docket: IMM-10144-12

Citation: 2013 FC 894

Ottawa, Ontario, August 22, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JULIO RAMON LALA BARROS,
ZOILA MERCEDES MIZHIRUMBAY MIZHIRUMBAY,
KIMBERLY ASHLEY LALA MIZHIRUMBAY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants ask the Court to set aside a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada, dated September 14, 2012, refusing their application for refugee protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. For the reasons that follow, their application is allowed, in part.

[2] Julio Ramon Lala Barros and his spouse, Zoila Mercedes Mizhirumbay Mizhirumbay are indigenous persons of Ecuador from the province of Cañar. Their primary language is Quechua. Mr. Barros and Ms. Mizhirumbay have a daughter named Kimberly Ashley Lala Mizhirumbay, who was born in the USA and is a citizen of that country.

[3] The Board accepted their evidence as to the treatment they received in Ecuador. Both Mr. Barros and Ms. Mizhirumbay and their respective families suffered abuse due to their indigenous heritage.

[4] Wealthy landowners stole livestock from Mr. Barros' community at gunpoint. In 2000, these landowners threatened to kill all of the members of Mr. Barros' community if they did not leave. During this incident, Mr. Barros' father was assaulted and injured. Mr. Barros and other members of his community left and sought work on ranches in Cañar City. They reported the incidents to the police but the police told them that nothing could be done. Mr. Barros and his family were required to work from 4 a.m. until 11 p.m. daily. They were paid with some of what they had produced, and on rare occasions, with money. The overseers of the ranch often physically assaulted the workers for not working fast enough. On one occasion, Mr. Barros was hit in the eye and suffered an injury that caused vision problems. On other occasions, Mr. Barros was assaulted with a horsewhip. The ranch was surrounded by barbed wire and the overseers would send dogs after those who attempted to escape. Mr. Barros did escape and fled to the USA in January, 2002 with the help of his brother who has lived in the USA since 1999.

[5] Ms. Mizhirumbay grew up on one of the ranches in Cañar and experienced similar treatment. She was assaulted many times, bitten by the overseers' dogs, hit with clubs, and suffered a fractured wrist from one assault. Ms. Mizhirumbay says that the overseers raped many of the female workers and murdered some of the inhabitants, including her uncle. Ms. Mizhirumbay attempted to work at two other ranches outside of the area, but suffered the same abuse. She eventually fled Ecuador and arrived in the USA in March, 2006, with the help of her two brothers who have lived in the USA since 1998.

[6] Mr. Barros and Ms. Mizhirumbay met in the USA. They were married and in 2008, they gave birth to their daughter, Kimberly Ashley Lala Mizhirumbay. Mr. Barros entered Canada on July 12, 2008 and filed for refugee protection on August 17, 2008. Ms. Mizhirumbay entered Canada along with their child on October 7, 2008 and filed for refugee protection the same day. Neither Mr. Barros nor Ms. Mizhirumbay made an asylum claim in the USA.

[7] The Board concluded that the applicants were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97(1) of the *Act*. It found that they had failed to rebut the presumption of state protection, that they have a valid internal flight alternative [IFA] in Quito, the capital of Ecuador, and that they lack subjective fear. The applicants submit that each of these findings is unreasonable.

State Protection

[8] The applicants testified that there were no police within a reasonable distance of the rural areas where they lived. They also testified about efforts they and similarly situated persons made

to seek protection, without result. The Board found that they had failed to overcome the presumption of state protection:

> I am not satisfied that police would not investigate all of the principal and secondary claimants' allegations if they were to return to Ecuador and encounter problems and report the problems to the police. I am also not persuaded that police would not prosecute the perpetrators if there is sufficient evidence of a crime. … I found the principal and secondary claimants' responses regarding the effectiveness of state protection were not persuasive, since they were largely unsubstantiated and not consistent with the documentary evidence. [emphasis added]

[9] This finding cannot withstand scrutiny. The evidence of the applicants was consistent with the documentary evidence before the Board. Although the reports laud the efforts of Ecuador, they state clearly that those efforts have not resulted in responsive action in most instances.

[10] A 2011 report by the US Department of State found:

1. Excessive force and isolated unlawful killings by the police force;
2. Impaired effectiveness of the police force as a result of corruption, poor hiring practices, insufficient training, supervision, and resources;
3. Widespread impunity for police abuses, including extrajudicial executions;
4. Corruption of officials;
5. Failure to process legal cases unless the police and judicial officials were bribed;
6. Vigilante justice continuing to be a problem particularly in indigenous communities and poor neighbourhoods of major cities where there is little police presence.

[11] The Report of the Special Rapporteur on contemporary forms of slavery, states that "despite the legal, policy and institutional framework aimed at eradicating contemporary forms of slavery and the measures that illustrate the strong commitment towards the achievement of this goal, in the Special Rapporteur's view, major challenges remain." [emphasis added] It is noted that the Special Rapporteur actually visited Quito, the exact location the Board found to be a viable IFA.

[12] In the same report, the Special Rapporteur also concluded that:

> Ecuador has shown genuine efforts to establish policies aimed at the elimination of contemporary forms of slavery affecting different sectors of the population.
> …
> Despite the progress made, the Special Rapporteur holds the view that contemporary forms of slavery persist in Ecuador and are directly related to pervasive instances of discrimination, social exclusion and poverty. They affect sectors of the population that have faced historical wrongdoings, such as Afro-descendents and indigenous peoples… [emphasis added].

[13] In my view, the Board ignored the evidence that measures taken, while laudable, remain insufficient in a concrete sense. It examined efforts, not results. In so doing, it "undertook a superficial, if not highly selective, analysis of the documentary evidence" and this constitutes a reviewable error: *Avila v Canada (Minister of Citizenship and Immigration),* 2006 FC 359 at para 35.

Internal Flight Alternative

[14] The Board concluded that the applicants could live in Quito without a serious possibility of being persecuted. However, this finding was based upon its mischaracterization of the risk

and the nature of the threat to the applicants. The Board focused on the previous landowners and overseers who had abused the applicants and concluded that it is unlikely that those parties would pursue them in Quito. However, the applicants never said that they feared that these previous persecutors would track them down.

[15] During the hearing, the Board asked the applicants what they feared about returning to Ecuador. They testified that they feared mistreatment by the landowners of ranches and estates, people who would employ them as domestic house workers, and people in Quito in general; but the Board does not turn its mind to anything other than the landowners.

[16] The Board failed to address the applicants' testimony that if they were to return to Quito instead of Cañar, they would experience racism, and their only potential for employment would be on ranches similar to those they worked on, or as domestic workers who also experience abuse; evidence consistent with the findings of the United Nations Human Rights Council.

[17] Accordingly, I find that the Board's IFA finding was unreasonable.

Subjective Fear

[18] Upon review of the record, I find that it was open to the Board to conclude that the applicants lacked subjective fear because they failed to file a claim for asylum in the USA, despite living there for a number of years.

[19] The applicants testified that they either did not know they could make an asylum claim because of advice they had received from a lawyer, or they would not have been able to because of significant language barriers. Both of the applicants had family in the USA and the Board was reasonably of the view that they would have known how the applicants could seek protection and have assisted them.

[20] In my view, that assessment cannot be set aside as unreasonable; however, a finding of subjective fear only goes to the refugee claim under section 96 of the Act and not a claim for protection under section 97: *Sanchez v Canada (Minister of Citizenship & Immigration)*, 2007 FCA 99 at paras 14-15, see also, *Odetoyinbo v Canada (Minister of Citizenship & Immigration),* 2009 FC 501 at para 7. Therefore it is only the Board's conclusion that the applicants are not persons in need of protection under section 97 that will be set aside.

[21] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, in part:

1. The decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada that the applicants are not persons in need of protection under section 97 of the *Immigration and Refugee Protection Act* is set aside and is remitted to a differently constituted Board for determination; and

2. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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