

Federal Court



Cour fédérale

Date: 20140228

Docket: IMM-10862-12

Citation: 2014 FC 202

Toronto, Ontario February 28, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**KUN KWAN GAO
RUNJIN XIAN
ANTONIO GAO SEN
ROBERTO GAO SEN
ROSA GAO SEN**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] For an applicant to fall under Article 1(E) of the *United Nations Convention Relating to the Status of Refugees* [Refugee Convention], he or she must have: the right to return, the right to work, the right to study, and full access to social services in the country in which they have taken residence.

[2] As noted by Justice Donald Rennie in *Sow v Canada (Minister of Citizenship and Immigration)*, 2011 FC 646:

[9] In a democratic country there is a presumption that a state can protect its own citizens. As such, the onus is on the applicant to rebut this presumption and prove the state's inability to protect through "clear and convincing" evidence: *Canada (Attorney General) v Ward* [1993] 2 SCR 689 at para 50; *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at paras 43-44; *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491 at para 13.

[3] To rebut the presumption of State protection, an applicant must satisfy a heavy evidentiary burden by introducing evidence of inadequate State protection. The quality of the evidence required to rebut such presumption must be reliable and be of sufficient probative value (*Lozada v Canada (Citizenship and Immigration)*, 2008 FC 397).

II. Introduction

[4] The Applicants seek judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board, wherein it was determined that the Applicants were excluded from refugee protection under Article 1E of the Refugee Convention and pursuant to s 98 of the *Immigration and Refugee Protection Act [IRPA]*.

III. Background

[5] The Principal Applicant, Mr. Kun Kwan Gao, and his wife, Mrs. Runjin Xian, are citizens of the People's Republic of China. They have lived in Panama as permanent residents for over 20 years.

[6] The couple's three children, Antonio Gao Sen, Roberto Gao Sen, and Rosa Gao Sen, were all born in Panama and are citizens of Panama.

[7] The Applicants state that their troubles began in Panama in 1992, when their store was robbed at gunpoint. It was robbed twice within one year.

[8] The Applicants claim they were robbed again in 2001, this time at their home. During the robbery, the Applicants state that Mrs. Xian was violently raped.

[9] In October 2008, the Applicants state that they were again attacked by unknown thugs at their store, and a relative was shot and killed.

[10] In an amended Personal Information Form [PIF] submitted by Mrs. Xian, it is stated that the couple hired a security guard after this shooting.

[11] In June 2009, Mrs. Xian claims that the guard's gun was taken away from him by unknown thugs. It is this incident, the Applicants explain, that finally drove them to leave Panama.

[12] In the same month, the Applicants received a 5-year visitor's visa from the United States. They arrived in the United States on September 30, 2009, and spent approximately 10 days in the country.

[13] The Applicants explain that they traveled to the United States first as they could not acquire a visitor's visa for Canada from Panama. They did not seek asylum during their stay in the United States.

[14] On October 5, 2009, the Applicants received a visitor's visa from the Canadian Consulate in New York for travel to Canada. The Applicants arrived in Canada on October 9, 2009.

[15] The Applicants claimed refugee protection on December 3, 2009.

[16] On September 28, 2012, the RPD rejected the Applicants' application for refugee status in Canada which is the underlying application before this Court.

IV. Decision under Review

[17] The RPD rejected the Applicants' refugee claim on September 28, 2012.

[18] The RPD firstly determined that the Applicants all held permanent resident status in Panama (or citizenship), and therefore, enjoyed all of the basic rights associated with nationality in Panama.

[19] The RPD applied the test in *Shamlou v Canada (Minister of Citizenship and Immigration)* (1995), 103 FTR 241, 32 Imm LR (2d) 135, in determining whether the Applicants enjoyed the basic rights attached to the possession of nationality in Panama: (a) the right to return; (b) the right to work freely; (c) the right to study, and (d) full access to social services (at para 35).

[20] The RPD found that the Applicants met these criteria. As such, the RPD determined that the Applicants could not request refugee protection against China in Canada. Their status in Panama excluded them from doing so by virtue of Article 1(E) of the Refugee Convention.

[21] In making its determination on the Applicants' exclusion, the RPD also concluded that the Principal Applicant's evidence in regard to his fear of persecution in Panama lacked credibility. In particular, the RPD noted that the Principal Applicant had not taken any steps to obtain police reports to corroborate his claims against Panama. Moreover, he failed to leave Panama for nearly one year after the incident, and failed to claim asylum in the United States during his travel there immediately prior to arriving in Canada. In the RPD's view, these factors all diminished the Applicants' credibility in regard to a fear of persecution.

[22] In light of this finding, and in the absence of convincing objective evidence establishing a nexus between the alleged crimes and the Applicants' race, the RPD determined that the Applicants faced no greater risk of being victims of crime than the general population of Panama. The RPD concluded that the Applicants had merely been the victims of random criminal acts.

[23] The RPD further found that the Applicants had not rebutted the presumption of State protection in Panama. The RPD concluded that there was insufficient evidence that the Applicants would not receive State protection in Panama because they were Chinese, or on the basis of another Convention grounds.

[24] Notwithstanding the RPD's findings regarding the Applicant's exclusion under Article 1(E) of the Refugee Convention, the RPD went on to find that the Applicants had also failed to sufficiently establish that they would be subject to a serious possibility of persecution or cruel and unusual treatment or punishment or danger of torture if returned to China.

V. Issues

[25] (1) Is the RPD's determination that the Applicants should be excluded under Article 1E of the Refugee Convention reasonable?

(2) Is the RPD's determination that the Applicants could have received State protection reasonable?

VI. Relevant Legislative Provisions

[26] The following legislative provisions of the *IRPA* are relevant:

Convention refugee	Définition de « réfugié »
<p>96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,</p> <p>(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or</p> <p>(b) not having a country of nationality, is outside the</p>	<p>96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :</p> <p>a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;</p> <p>b) soit, si elle n'a pas de nationalité et se trouve hors</p>

country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed

(iii) la menace ou le risque ne résulte pas de sanctions légitimes —

in disregard of accepted international standards, and

sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Exclusion – Refugee Convention

Note marginale : Exclusion par application de la Convention sur les réfugiés

98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[27] The following provision of the Refugee Convention is also relevant:

1E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the

1E. Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité

nationality of that country. de ce pays.

VII. Standard of Review

[28] The issue of whether facts give rise to an exclusion under Article 1(E) of the Refugee Convention and section 98 of the *IRPA* is a question of mixed fact and law, reviewable on the standard of reasonableness (*Ramirez-Osorio v Canada (Minister of Citizenship and Immigration)*, 2013 FC 461; *Fonnoll v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1461).

[29] The issue of State protection is also a question of mixed fact and law, reviewable on the standard of reasonableness (*Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004).

VIII. Position of the Parties

[30] The Applicants submit that the RPD erred in finding that they were excluded from protection under Article 1(E) of the Refugee Convention. The Applicants argue that their fear of persecution is clearly linked to their race, and they will be persecuted if returned to Panama. They maintain that there was documentary evidence before the RPD that indicated that Chinese people are disproportionately targeted for crime and face discrimination in Panama.

[31] The Applicants also argue that the RPD's conclusion that adequate State protection was available to the Applicants in Panama was made without proper regard to the documentary evidence.

[32] The Respondent submits that there was no error in the RPD's finding that the Applicants were excluded from protection under Article 1(E) of the Refugee Convention, as their claim against Panama was found to be non-credible and was not supported by the documentary evidence. The Respondent states that the RPD was therefore open to find that the Applicants had not established a nexus between their victimization and their race.

[33] The Respondent contends that the documentary evidence on record does not demonstrate that criminals are targeting Chinese people because they are Chinese, but rather, because they are shopkeepers, perceived as wealthy. Moreover, the Respondent argues that the Applicants have not established how they personally have been subjected to persecution based on their race; the evidence in regard the Applicants' personal experience suggests that they were victimized for economic reasons.

[34] Lastly, the Respondent submits that the RPD's finding regarding State protection is reasonable as the evidence on record demonstrates that the police investigated all of the Applicants' complaints in a prompt manner. Furthermore, the Applicants failed to provide any evidence to suggest that Chinese people in Panama suffered disproportionately from crime as compared to the general population.

IX. Analysis

(1) Is the RPD's determination that the Applicants should be excluded under Article 1E of the Refugee Convention reasonable?

[35] For an applicant to fall under Article 1(E) of the Refugee Convention, he or she must have: the right to return, the right to work, the right to study, and full access to social services in the country in which they have taken residence.

[36] In the present case, the uncontradicted evidence demonstrates that the Applicants had the right to return to and work in Panama; they submitted indefinite work permits and voter cards to the RPD. Accordingly, the Applicants did not advance any argument (or evidence) as to whether they had been denied such rights, or the right to study or to access to social service.

[37] The burden was on the Applicants to demonstrate that they did not enjoy the rights and obligations of nationals of Panama. Without any evidence indicating the above criteria could not be met, the Court finds that the RPD was open to reach the conclusion that Article 1E of the Refugee Convention applied to the Applicants.

(2) Is the RPD's determination that the Applicants could have received State protection reasonable?

[38] It is settled law that absent a complete breakdown of State apparatus, it should be presumed that a State is capable of protecting its citizens (*Ruszo*, above, at para 29).

[39] As noted by Justice Rennie in *Sow*, above:

[9] In a democratic country there is a presumption that a state can protect its own citizens. As such, the onus is on the applicant to

rebut this presumption and prove the state's inability to protect through "clear and convincing" evidence: *Canada (Attorney General) v Ward* [1993] 2 SCR 689 at para 50; *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at paras 43-44; *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491 at para 13.

[40] To rebut the presumption of State protection, an applicant must satisfy a heavy evidentiary burden by introducing evidence of inadequate State protection. The quality of the evidence required to rebut such presumption must be reliable and be of sufficient probative value (*Lozada*, above).

[41] In the present case, the documentary evidence before the RPD was clear; Panama is a democracy with a functioning police and judicial system; albeit, perhaps not a perfect one.

[42] The RPD gave the Applicants several opportunities to adduce evidence that would support their allegations that Panama was unable or unwilling to protect them against persecution; however, the Applicants failed to provide sufficient evidence to rebut the presumption of State protection.

[43] The evidence before the RPD clearly establishes that the police attended the alleged incidents claimed by the Applicants, searched the premises, asked questions, took notes, and, in certain instances, even had the Applicants review photographs of suspects in an attempt to identify their assailants. In the Court's view, these are actions that would reasonably be expected from law enforcement officials responding to a crime.

[44] Not having provided a police report, in and of itself, does not demonstrate that the police was ineffective or inactive in the matter; rather, it appears to the contrary, that it was an attempt by the police to find the means by which to identify the assailants.

[45] Without relevant, reliable and convincing evidence proving the State's unwillingness or inability to protect the Applicants, the RPD was open to conclude that the presumption of State protection had not been rebutted (see *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 FCR 636 at para 30).

[46] In light of the above, the Court finds that the RPD's determination falls within the range of reasonable, acceptable outcomes.

[47] This finding is sufficient to dispose of this application for judicial review. The Court, therefore, does not consider it necessary to address the Applicants' allegations regarding the RPD's findings on their fear of persecution in China.

X. Conclusion

[48] For all of the above reasons, the Applicants' application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicants' application for judicial review be dismissed with no question of general importance for certification.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-10862-12

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