Federal Court  Cour fédérale

Date: 20150113

Docket: IMM-5322-14

Citation: 2015 FC 45

Vancouver, British Columbia, January 13, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

CRISTHIAN JOSUE ARTEAGA BANEGAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This Court has held that a Tribunal's systematic denial of refugee protection for those who fall victim to gang attacks and recruitment attempts would lead to an absurd result and seem contrary to Parliament's intent. This view is expressed, by way of analogy, by Justice Yvan Roy in *Loyo de Xicara v Canada (Minister of Citizenship and Immigration)*, 2013 FC 593 [*Loyo de Xicara*]:

> [17] The RPD's logic, if pushed further, leads to an incongruous and even an absurd outcome. Thus, in the case of a country in the throes of genocide, an individual could not invoke section 97, because the fact that he or she will be killed along with his or her fellow citizens makes the risk generalized within the meaning of section 97. In a sense, the greater the danger and the more people facing it, the harder it is to claim protection under section 97 of the Act.
>
> [18] It is difficult to believe that such an interpretation is consistent with Parliament's intent. Not only does this interpretation quickly lead to absurdity, but it contradicts the very purpose of the provision. Parliament did not want generalized allegations to be accepted. However, a highly personalized allegation, even one that is shared by other members of the state, meets the conditions of subparagraph 97(1)(b)(ii) of the Act.
>
> […]
>
> [24] As the preceding analysis shows, the Court is of the view that the RPD's decision must be set aside because of its conclusion that a personalized risk or threat loses this characteristic based on the mere fact that the criminal conduct in question is common in a given country. This approach strips section 97 of the Act of its meaning, as this Court has noted more than once.
>
> (*Loyo de Xicara*, above at paras 17-18 and 24.)

II. Background

[2] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision dated June 23, 2014 by the Refugee Protection Division [RPD], rejecting the Applicant's claim to refugee protection under sections 96 and 97 of the IRPA.

[3] The Applicant, Cristhian Josue Arteaga Banegas, is a nineteen-year old Honduran man who is targeted for recruitment by the Mara 18, a powerful transnational gang.

[4] Since the age of twelve, the Applicant has repeatedly resisted the Mara 18's violent attempts to recruit him. As a result, the Applicant was threatened and severely beaten on multiple occasions, leaving him with permanent and visible scars.

[5] Following these attacks, the Applicant fled Honduras as an unaccompanied minor in 2011 and surrendered himself to US Immigration authorities near the Mexican-US border. After being released from several months of detention and fearing deportation to Honduras, the Applicant traveled to Canada on September 29, 2012.

[6] The Applicant claimed refugee protection on October 24, 2012, and a hearing was held before the RPD on May 14, 2014.

III. Impugned Decision

[7] In its decision dated June 23, 2014, the RPD rejects the Applicant's claim on the basis of a lack of nexus with a Convention ground and of lack of personalized risk, under both sections 96 and 97of the IRPA.

[8] On the substance of the claim, the RPD finds that the Applicant is a victim of widespread criminality, rather than a targeted member of a "particular social group" for the purposes of section 96 of the IRPA (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*]; *Zefi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 636 [*Zefi*]).

[9] The RPD further finds that the Applicant's refusal to join the Mara 18 is not an expression of a "political opinion", as the Mara 18 is not a political organization and as it does not influence or develop government policy.

[10] Finally, the RPD concludes that the Applicant fears a generalized risk, similar in nature and degree as that faced by other young Honduran males. Thus, the Applicant does not meet the definition of a "person in need of protection" found in subparagraph 97(1)(*b*)(ii) of the IRPA. Relying on *Ward*, above, the RPD reasons that the Applicant is not individually targeted by the Mara 18 based on any special, unique characteristic or skill.

IV. Legislative Framework

[11] Below are the relevant provisions of the IRPA:

Convention refugee	**Définition de « réfugié »**
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,	**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 :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*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;
(*b*) not having a country of nationality, is outside the	*b*) soit, si elle n'a pas de nationalité et se trouve hors

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

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

Personne à protéger

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 themself 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 le sont généralement pas,

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

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes

international standards, and	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.
(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.

V. Standard of Review

[12] The parties disagree as to the applicable standard of review.

[13] The Applicant argues that the RPD erred in misconstruing the legal tests under sections 96 and 97 of the IRPA, thus engaging the standard of correctness. The Applicant submits that the RPD's evidentiary findings attract the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-50 [*Dunsmuir*]).

[14] By contrast, the Respondent submits that the RPD's analysis of sections 96 and 97 of the IRPA, which are issues of fact and of mixed fact and law, command the application of the reasonableness standard (*McLean v British Columbia (Securities Commissions)*, [2013] 3 SCR 895; *Singh v Canada (Minister of Citizenship and Immigration)*, 2011 FC 342 at para 17; *Perez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1015 at paras 20-21).

[15] The Court agrees with the Respondent's position. Accordingly, the reasonableness standard "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir* at para 47; *Ore v Canada (Minister of Citizenship and Immigration)*, 2014 FC 642 at paras 16-17; *V.L.N. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 768 at para 15; *Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213 at para 9).

VI. Arguments

a) The Applicant's Position

[16] The Applicant claims that the RPD failed to properly assess his claim under the Convention grounds of "membership in a particular social group" and "political opinion" (*Solodovnikov v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1225 at para 10; *Ghirmatsion v Canada (Minister of Citizenship and Immigration)*, 2011 FC 519 at para 106).

[17] First, the Applicant submits that the RPD failed to adequately consider his innate characteristics of being a young Honduran male with permanent visible injury scars resulting from attacks by the Mara 18, distinguishing him as a member of a particular social group. Relying on the United Nations High Commission "Guidance Note on Refugee Claims Relating to Victims of Organized Crime" (Geneva, March 2010) [UNHCR Guidelines], the Applicant argues that the characteristics of gender, youth and social status or lack of parental guidance are

immutable characteristics, which have not been properly assessed by the RPD in its section 96 analysis.

[18] Second, the Applicant claims that his repeated refusals to join the Mara 18, whether expressed directly or imputed, are an expression of his political opinion. The Applicant submits that the RPD failed to consider how the Honduran State may act as an agent of persecution when a powerful gang such as the Mara 18 exercises de facto control over the population or acts in collusion with State actors and how the observance of the rule of law may be an expression of political opinion.

[19] Third, the Applicant submits that the RPD erred in conflating the reasons for the alleged risk with the risk itself for the purposes of section 97 of the IRPA (*Correa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 252 at paras 83-84 [*Correa*]; *Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678 at para 40). The Applicant argues that he faces a particular and individualized risk, as evidenced, by Dr. Lise Loubert's Medical Letter, dated April 28, 2014 (Applicant's Record, at pp 282-283; *Castaneda v Canada (Minister of Citizenship and Immigration)*, 2011 FC 724 at paras 5-6).

[20] Finally, the Applicant submits that the RPD erred in ignoring key evidence directly contradicting some of its findings (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ 1425 at para 17).

b) The Respondent's Position

[21] The Respondent contends that the RPD reasonably considered the overall evidence in rejecting the Applicant's claim and that the Applicant is asking the Court to reweigh the evidence, which lies beyond the scope of judicial review.

[22] The Respondent further submits that as a victim of criminality in Honduras, the Applicant does not face persecution based on an adherence to any particular group (*Zefi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 636).

[23] Moreover, the Respondent argues the RPD's finding that the Applicant faces a generalized risk is reasonable, as he is part of a broader group of young Honduran males who the Mara 18 has identified for recruitment, in a country where violence is prevalent (*De Parada v Canada (Minister of Citizenship and Immigration)*, 2009 FC 845; *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, aff'd 2009 FCA 31 at para 10; *Correa*, above).

VII. Analysis

[24] The determinative issue is whether the RPD erred in finding that the Applicant does not meet the requirements for refugee status, under sections 96 and 97 of the IRPA.

a) Membership in a particular social group

[25] On behalf of the Supreme Court of Canada, Justice Laforest provides interpretative guidance to the meaning of "membership in a particular social group". Indeed, such a group may

be defined by an innate or unchangeable characteristic, and should take into account "the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative" (*Ward*, above at para 70; *Canada (Minister of Citizenship and Immigration) v B451*, 2013 FC 441 at para 27).

[26] The UNHCR Guidelines provide further guidance in interpreting "membership in a particular social group" for the purposes of section 96:

> 34. Individuals who resist forced recruitment into gangs or oppose gang practices may share innate or immutable characteristics, such as their age, gender and social status. Young people of a certain social status are generally more susceptible to recruitment attempts or other violent approaches by gangs precisely because of the characteristics that set them apart in society, such as their young age, impressionability, dependency, poverty and lack of parental guidance. Indeed, recent studies have found that the recruitment practices of Central American gangs frequently target young people. Thus, an age-based identification of a particular social group, combined with social status, could be relevant concerning applicants who have refused to join gangs. The immutable character of "age" or "youth" is in effect, unchangeable at any given point in time.
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> 37. Past actions or experiences, such as refusal to join a gang, may be considered irreversible and thus immutable. For instance, In Matter of S-E-G (2008), the United States Board of Immigration Appeals accepted that "youth who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed." Past association with a gang may be a relevant immutable characteristic in the case of individuals who have been forcibly recruited.
>
> *Characteristics fundamental to one's conscience and exercise of human rights*
>
> 38. Resisting involvement in crime by, for instance, evading recruitment or otherwise opposing gang practices may be considered a characteristic that is fundamental to one's conscience

> and the exercise of one's human rights. At the core of gang resistance is the individual's attempt to respect the rule of law and, in the case of those who refuse to join the gangs, also the right to freedom of association, including the freedom to not associate. Former gang members may also be considered as seeking to exercise their right to rehabilitation and reform. The ethical belief at stake, namely the belief to be "law-abiding", may be considered to be of such a fundamental nature that the person concerned ought not be required to renounce it, as this, in effect, would be tantamount to requiring him/her to give in to the demands of the gangs and become involved in crime. United States courts, for instance, have recognized particular social groups such as "young people who refuse to join a gang because they oppose crime".

b) Political opinion

[27] Justice Laforest further states that the Convention ground of "political opinion" may include perceived political opinions by the perpetrators, which need not to be expressed outright or correctly be attributed to a claimant (*Ward*, above at paras 81-83). In other words, the grounds for persecution of "political opinion" ascribed to a claimant need not to necessarily conform to his or her true beliefs. This reasoning is based on the premise that refugee claimants may not have opportunity to articulate their beliefs outright and thus, a political opinion is often imputed to them by their persecutory agents.

[28] This interpretation of the Convention ground of political opinion is consistent with the UNHCR Guidelines:

> 45. Gang-related refugee claims may also be analysed on the basis of the applicant's actual or imputed political opinion vis-à-vis gangs, and/or the State's policies towards gangs or other segments of society that target gangs (e.g. vigilante groups). In the UNHCR's view, the notion of political opinion needs to be understood in a broad sense to encompass "any opinion on any matter in which the machinery of State, government, society, or policy may be engaged".

> 46. The 1951 Convention ground of political opinion needs to reflect the reality of the specific geographical, historical, political, legal, judicial, and socio-cultural context of the country of origin. In certain contexts, expressing objections to the activities of gangs or to the State's gang-related policies may be considered as amounting to an opinion that is critical of the methods and policies of those in power and, thus, constitute a "political opinion" within the meaning of the refugee definition.
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> 47. It is important to consider, especially in the context of Central America, that powerful gangs, such as the Maras, may directly control society and de facto exercise power in the areas where they operate. The activities of gangs and certain State agents may be so closely intertwined that gangs exercise direct or indirect influence over a segment of the State or individual government officials. Where criminal activity implicates agents of the State, opposition to criminal acts may be analogous with opposition to State authorities. Such cases, thus, may under certain circumstances be properly analyzed within the political opinion Convention ground. Some jurisdictions have recognized that opposition to a criminal activity or, conversely, advocacy in favour of the rule of law may be considered a political opinion.
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> 48. Although not every expression of dissent will amount to political opinion, it may be political where the dissent is rooted in a political conviction. Where an applicant has refused the advances of a gang because s/he is politically or ideologically opposed to the practices of gangs and the gang is aware of his/her opposition, s/he may be considered to have been targeted because of his/her political opinion.
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> (UNHCR Guidelines, at paras 45-48.)

[29] Moreover, semblance of political neutrality and imputed political are relevant to the section 96 analysis of the Convention ground of political opinion. For instance, in certain situations, neutrality is not the absence of an opinion but rather a conscious and deliberate choice of the Applicant and may constitute a political opinion. A refusal to join a gang may be perceived by recruiters as an act of betrayal and express opposition to a gang. Family members

of those who resist gang recruitment may also be perceived to hold the same opinion (UNHCR Guidelines, at paras 50-51).

c) Generalized risk assessment under section 97 of the IRPA

[30] Finally, section 97 of the IRPA provides a mechanism by which a claimant may acquire refugee protection by demonstrating a personalized risk to life or a risk of cruel and unusual treatment or punishment (*Loyo de Xicara*, above).

[31] This Court has held that a Tribunal's systematic denial of refugee protection for those who fall victim to gang attacks and recruitment attempts, would lead to an absurd result and seem contrary to Parliament's intent. This view is expressed, by way of analogy, by Justice Yvan Roy in *Loyo de Xicara*, above:

> [17] The RPD's logic, if pushed further, leads to an incongruous and even an absurd outcome. Thus, in the case of a country in the throes of genocide, an individual could not invoke section 97, because the fact that he or she will be killed along with his or her fellow citizens makes the risk generalized within the meaning of section 97. In a sense, the greater the danger and the more people facing it, the harder it is to claim protection under section 97 of the Act.
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> [18] It is difficult to believe that such an interpretation is consistent with Parliament's intent. Not only does this interpretation quickly lead to absurdity, but it contradicts the very purpose of the provision. Parliament did not want generalized allegations to be accepted. However, a highly personalized allegation, even one that is shared by other members of the state, meets the conditions of subparagraph 97(1)(b)(ii) of the Act.
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> [24] As the preceding analysis shows, the Court is of the view that the RPD's decision must be set aside because of its conclusion

> that a personalized risk or threat loses this characteristic based on the mere fact that the criminal conduct in question is common in a given country. This approach strips section 97 of the Act of its meaning, as this Court has noted more than once.
>
> (*Loyo de Xicara*, above at paras 17-18 and 24.)

[32] The view expressed by Justice James Russell in *Correa* addressed the tension between a personalized and generalized risk faced by a victim of gang violence:

> [46] While a full consensus has yet to emerge, I think that there is now a preponderance of authority from this Court that personal targeting, at least in many instances, distinguishes an individualized risk from a generalized risk, resulting in protection under s. 97(1)(b). Since "personal targeting" is not a precise term, and each case has its own unique facts, it may still be the case that "in some cases, personal targeting can ground protection, and in some it cannot" (*Rodriguez*, above, quoted with approval in *Pineda v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1543 [*Pineda (2012)*]. However, in my view there is an emerging consensus that it is not permissible to dismiss personal targeting as "merely an extension of," "implicit in" or "consequential harm resulting from" a generalized risk. That is the main error committed by the RPD in this case, and it makes the Decision unreasonable.
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> (*Correa*, above at para 46.)

[33] Furthermore, in granting an application for judicial review based on a misapprehension by the RPD of subparagraph 97(1)(*b*)(ii) of the IRPA in the similar case of *Lovato v Canada (Minister of Citizenship and Immigration)*, 2012 FC 143 [*Lovato*], Justice Donald J. Rennie states:

> [13] In this case, the Board was guided by an incorrect understanding of the meaning of section 97(1)(b)(ii). Despite finding that the applicant was subject to a particularized risk of harm, it concluded that the risk also affected the population at large because all El Salvadorians are at risk of violence from the MS. The Board noted: "There was no persuasive evidence before me

> that the claimant was targeted for any other reasons than the reasons I have already indicated", i.e. those that motivate the MS to target any member of the population. In this way, the Board incorrectly focused on the reasons for which the applicant was being targeted, rather than the evidence that the MS was specifically targeting the applicant to an extent beyond that experienced by the population at large. As a result, the Board's decision is unreasonable.
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> (*Lovato*, above at para 13.)

[34] In light of the above, the Court finds that the RPD failed to properly consider the nature of the risk faced by the Applicant by summarily dismissing the attacks by the Mara 18 as a result of widespread criminal activity in Honduras, without regard to the Applicant's individual circumstances. The Applicant testified that the Mara 18 can easily identify him as a resistor to recruitment based on the visible scars on his body resulting from previous attacks. He also testified that he was raised by a single mother. The Applicant testified that he continuously has been targeted for gang recruitment by the Mara 18 since the age of twelve, and that his refusals to join the gang are perceived by his persecutors as an expression of opposition or anti-gang sentiments. The Applicant further submitted objective evidence demonstrating that youth, gender and social status are major factors for recruitment by the Mara 18 in Honduras. Moreover, the Applicant was deemed credible by the RPD.

[35] In its finding that the Applicant belongs to a general demographic of potential recruits by the Mara 18, the RPD failed to engage in an adequate individualized assessment of risk. The RPD failed to consider the relevant factors of age, gender, visible scars resulting from previous attacks, and the possibility of retribution by gang-members cumulatively. The RPD failed to consider how the Applicant's repeated refusals to join the Mara 18 and resulting scars may have

put him at risk to subsequent attacks, thus placing him outside the scope of a generalized risk (*Pineda v Canada (Minister of Citizenship and Immigration)*, 2007 FC 365 at para 17).

[36] The commonality of crime in Honduras does not lend itself automatically to a dismissal of a personalized risk; each determination must draw upon an Applicant's particular circumstances. In other words, such as stated by the Court in *Lovato*, above, and in *Vivero v Canada (Minister of Citizenship and Immigration)*, 2012 FC 138, section 97 must not be interpreted in a manner that strips it of any content or meaning:

> [14] If any risk created by "criminal activity" is always considered a general risk, it is hard to fathom a scenario in which the requirements of section 97 would ever be met. Instead of focusing on whether the risk is created by criminal activity, the Board must direct its attention to the question before it: whether the claimant would face a personal risk to his or her life or a risk of cruel and unusual treatment or punishment, and whether that risk is one not faced generally by other individuals in or from the country. Because the Board failed to properly undertake this inquiry in this case, the decision must be set aside.
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> (*Lovato*, above at para 14.)

[37] Thus, finding that the RPD failed to properly engage in such an inquiry, and finding that the Applicant's particular circumstances transcend the risks faced generally by the Honduran population or by other young Honduran males, the RPD's decision must be set aside.

VIII. Conclusion

[38] In light of the foregoing, the application is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is to be heard anew by a differently constituted panel.

3. There is no question of general importance to be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5322-14
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DATE OF HEARING:	JANUARY 12, 2015
JUDGMENT AND REASONS:	SHORE J.
DATED:	JANUARY 13, 2015

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