

Federal Court



Cour fédérale

Date: 20230213

Docket: IMM-3498-22

Citation: 2023 FC 213

Ottawa, Ontario, February 13, 2023

PRESENT: Mr. Justice Pentney

BETWEEN:

DINORA ESPERANZA GUZMAN DE PENA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGEMENT AND REASONS

[1] This is an application for judicial review of the decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board finding the Applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The determinative issue in this case is whether the RPD's finding that the Applicant did not face a personalized risk under section 97 is reasonable. For the reasons that follow, I find that it is not, and therefore the decision must be set aside.

I. Background

[3] The Applicant, Dinora Esperanza Guzman De Pena is a citizen of El Salvador. Her siblings, mother, and son are Canadian citizens, and she has a daughter who resides in the United States.

[4] The Applicant operated several small businesses in El Salvador, and most recently, she ran a variety store there. Her narrative describes the events that caused her to flee the country:

- On January 3, 2012, a man entered her store, claiming to be the local leader of the infamous Mara Salvatrucha [MS-13] gang. He called her by name and told her nothing would happen to her if she cooperated; he pointed a gun at one of her employees and demanded that she hand over the money in her cash register. The Applicant complied, turning over approximately \$1,000;
- After the assailant left, the Applicant noticed graffiti associated with MS-13 had been painted on her storefront;
- She closed her store for approximately two months because of her fear that the threats would be repeated, but she decided to re-open because she needed to gather funds to relocate to another area;

- After this, she learned that another business owner in her neighbourhood had been murdered for not complying with the MS-13 demands;
- On June 2, 2012, as she was closing the store, the same gang leader arrived accompanied by another man. They threatened the Applicant, and the gang leader told her she could not hide, the gang knew where she lived and they would find her no matter where she went. He took the money she had in the store and told her she would be safe as long as she cooperated and did not try to hide or go to the police;
- After this, members of the gang came to the store every week to demand money; she paid them, although she became unable to cover her expenses;
- By November 2012, the Applicant could no longer bear the situation so she closed her store permanently and moved to another location in El Salvador;
- She travelled to the United States with the financial assistance of her children, and she stayed there to help her daughter who was in an abusive relationship; and
- In 2016, the Applicant came to Canada and claimed refugee status.

[5] The Applicant's refugee claim was refused, but this Court overturned the RPD decision: *Pena v Canada (Citizenship and Immigration)*, 2020 FC 1135. The matter was returned to the RPD so that it could assess the Applicant's claim under section 97 of the IRPA.

[6] The RPD dismissed the Applicant's claim, dealing both with the question of whether she had established a nexus to a Convention ground under section 96 and whether she faced a

personalized risk under section 97 of the *IRPA*. The RPD found that there was no nexus under section 96, and that the Applicant had not established that she faced a risk that was different from the threats faced by other residents of El Salvador. Therefore, the RPD dismissed the claim.

II. Issues and Standard of Review

[7] The only issue is whether the RPD's decision is reasonable, under the framework established by *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[8] Under the *Vavilov* framework, a reviewing court “is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints” (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2 [*Canada Post*]). The burden is on the applicant to satisfy the Court “that any shortcomings or flaws relied on... are sufficiently central or significant to render the decision unreasonable” (*Vavilov* at para 100, cited with approval in *Canada Post* at para 33).

III. Analysis

[9] For the reasons that follow, I find that the decision is unreasonable and must be quashed.

[10] Although the RPD dealt with the nexus issue under section 96, its jurisdiction to do so is in doubt because of the terms of the Court's judgment in the previous judicial review. The

judgment in that case specifically referred only the section 97 issue back to the RPD, but the reasons make clear that the Court found the RPD's determination that the Applicant had not established a nexus to a Convention ground to be reasonable.

[11] It is not necessary to resolve the question of the RPD's jurisdiction in this case, because I am persuaded that its finding that the Applicant had not established a personalized risk under section 97 is unreasonable. The knotty question of the RPD's jurisdiction to deal with nexus under section 96, in the somewhat unusual circumstance of this case, is best left for another day.

[12] Turning to the section 97 issue, the RPD described the Applicant's fear:

The panel finds the claimant's fear is a generalized one, she will be targeted to pay a "rent" and should she fail to comply, she would be killed. This is her statement as to why she fears returning to El Salvador.

[13] The RPD found that this did not bring the Applicant within section 97, because "everyone in El Salvador faces a similar risk as the claimant fears experiencing, that of extortion."

[14] This finding is unreasonable.

[15] Although the RPD acknowledged that the jurisprudence of this Court "requires a personalized review in the context of the actual and potential risks to which the claimant is subject", it did not, in fact, undertake such an analysis.

[16] The RPD's analysis refers to the key elements of the Applicant's narrative summarized above, and it does not raise any question regarding her credibility. Instead, the RPD summarized a series of decisions of this Court that dealt with instances of threats from MS-13 against individuals in El Salvador. From this, the RPD concluded that the Applicant did not face a personalized threat.

[17] The following passage from the RPD's decision is indicative of its train of analysis:

In cases like this, where the general public is subject to the risk of crime, the fact that some individuals are more exposed to the risk because they live in more dangerous areas or because they are perceived as being wealthier, does not necessarily make them persons in need of protection. A person who is a direct victim of crime is not automatically a person in need of protection within the meaning of section 97 of the Act.

Even though the claimant may have been specifically targeted by [MS-13] nine years ago, the panel finds that based on the documentary evidence, everyone in El Salvador faces a similar risk as the claimant fears experiencing, that of extortion.

[18] This is an unreasonable finding, in light of the Applicant's unchallenged evidence that she had faced a series of escalating threats, and had been specifically targeted by MS-13. While it is true that before this sequence of events she may have faced a generalized risk simply by virtue of operating a store in El Salvador, the RPD's analysis does not consider whether that turned into a personalized risk once MS-13 began targeting her. The Applicant's evidence showed that she experienced a sequence of escalating threats from MS-13, culminating in gunfire and specific threats of retribution if she did not cooperate, combined with marking her store with graffiti, telling her they knew she had closed her store and gone into hiding for a period of time, and demanding that she pay an ongoing "rent".

[19] The RPD's conclusion that this evidence did not support a finding that the Applicant faced a personalized risk is without explanation. Its reference to the cases where the threats are associated with where a person lived, or their perceived wealth, is not directly applicable to the Applicant's situation, and the RPD did not elaborate on why these decisions supported its conclusion.

[20] The development in this Court's jurisprudence on the framework for analyzing generalized versus personalized risks under section 97 has been discussed in previous decisions, and it is not necessary to repeat this here: see *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678; *Correa v Canada (Citizenship and Immigration)*, 2014 FC 252 [*Correa*].

[21] Several key points emerge from the case law. First, as the RPD noted, the decision-maker is required to examine the specific circumstances of the individual claimant in order to assess whether their experience brings them within the parameters of section 97. Justice Zinn described this in *Guerrero v Canada (Citizenship and Immigration)*, 2011 FC 1210, [2013] 3 FCR 20, at para 34:

I do not accept that protection under the Act is limited in the manner submitted by the respondent. This is not to say that persons who face the same or even a heightened risk as others face of random or indiscriminate violence from gangs are eligible for protection. However, where a person is specifically and personally targeted for death by a gang in circumstances where others are generally not, then he or she is entitled to protection under section 97 of the Act if the other statutory requirements are met.

[22] Several decisions have cited this passage, with approval: see, for example *Correa* at para 51; *Vaquerano Lovato v Canada (Citizenship and Immigration)*, 2012 FC 143 [*Lovato*], at para 12.

[23] The case law also emphasizes the importance of not conflating the initial reason for the threat (e.g. that the person owns a business or is perceived to be rich) with the risks they face once they are targeted (see *Correa* at paras 56-57, 83, 91; *Lovato* at para 13). What matters under section 97 is the risk the claimant faces on their return, and in this regard, the specific threats they faced are more important than the original perceived motivation of those who threaten them.

[24] In my view, the RPD's decision is unreasonable because it did not explain how or why the Applicant's narrative – which the RPD did not doubt – was not sufficient to establish that she faces a personalized risk in El Salvador. There may well be reasons, on the evidence in this case, to reach such a conclusion, but the RPD does not explain its reasoning. This question is central to the RPD's decision, and this gap in its reasoning is fatal to the decision.

[25] For all of these reasons, I find the RPD decision to be unreasonable.

[26] The decision of the RPD dated March 23, 2022 is quashed and set aside. The matter is remitted back to the RPD for a reconsideration of the section 97 issue. To be clear, and consistent with the judgment in the previous decision of this Court, the RPD is not to re-consider the section 96 issue.

[27] There is no question of general importance for certification.

JUDGMENT in IMM-3498-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision of the RPD dated March 23, 2022 is quashed and set aside.
3. The matter is remitted back to the RPD for a reconsideration of the section 97 issue.
4. There is no question of general importance for certification.

"William F. Pentney"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3498-22

STYLE OF CAUSE: DINORA ESPERANZA GUZMAN DE PENA v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 9, 2023

**REASONS FOR JUDGMENT
AND JUDGMENT:** PENTNEY J.

DATED: FEBRUARY 13, 2023

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