Federal Court  Cour fédérale

Date: 20100301

Docket: IMM-2158-09

Citation: 2010 FC 238

Ottawa, Ontario, March 1, 2010

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

EUSEBIO FRIAS MUNOZ
CLAUDIA FLORES SOTO
VIVIAN AUDREY FRIAS FLORES

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] The applicants are a family and citizens of Mexico. They challenge the April 8, 2009 decision by a member of the Refugee Protection Division (the tribunal or the RPD) who determined the applicants were not Convention Refugees and are not persons in need of protection.

[2] I note this is their second appearance before the Refugee Division. The first negative finding they received was set aside by Justice Dawson, then of this Court, in *Munoz v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 995 on the basis the then tribunal had relied on the case of *Xue v. Canada (Minister of Citizenship and Immigration)*, 195 F.T.R. 229 for its state protection finding, a case which was subsequently impugned by the Federal Court of Appeal. In present case, I also note the tribunal did not make a finding on the availability of state protection despite the fact the principal applicant did not complain to the police.

[3] Counsel for the applicants raises three principal issues in their challenge to the decision:

1. It erred in law by applying the wrong test for what constitutes a generalized risk under section 97 of the *Immigration and Refugee Protection Act* (IRPA) and misconstrued the nature of the risk faced by the applicants.

2. It erred in finding the applicants had a viable IFA in Tijuana, Monterrey and Guadalajara. She argues such finding was unreasonable being made without regard to the evidence and moreover having applied an erroneous heightened standard of proof in its IFA analysis.

3. It made an unreasonable plausibility finding in the light of the evidence, erred by requiring the applicants to provide corroborating evidence and denied them procedural fairness by effectively preventing Mr. Munoz from providing a proper explanation.

Background

[4] In his Personal Information Form (PIF), Mr. Munoz writes he is an accountant by profession and worked for almost 6 years as a manager in a Volkswagen dealership in Mexico City.

[5] He fears returning to Mexico because he experienced extortion at the hands of Gerardo Garcia, a Judicial Police Officer and a member of a large criminal gang. He claims this person has threatened his life and that of his wife and daughter.

[6] Mr. Garcia, Mr. Munoz asserts, was part of a group of people who came on several occasions to the dealership to buy used and sometimes new cars. They were always together; they were armed and some of them wore the badge of the Judicial Police. They rode in Judicial Police vehicles.

[7] Mr. Munoz's problems began in August 2004 when Mr. Garcia told him he and his friends had been good customers of his dealership and would remain so provided they were remunerated for past sales. Mr. Munoz said he refused the extortion. Mr. Garcia then threatened him. The demands for money continued with Mr. Munoz always refusing, but not reporting the extortions to the Public Ministry, as he feared Mr. Garcia would find out and would exact retribution. Nor did he report the extortion to the owner of the dealership he was a senior officer of.

[8] In September 2005, Mr. Munoz indicates Mr. Garcia came to the dealership asking for a free new car. He refused and moved his family to his aunt's home outside of Mexico City, fleeing that

country on November 16, 2005 leaving his family behind; they eventually joined him on March 31, 2006.

[9] In his testimony, Mr. Munoz acknowledged he did not seek state protection i.e. make a complaint about the extortions he had undergone because his persecutor being a member of the judicial police, protection would not be reasonably forthcoming.

The tribunal's decision

[10] The tribunal first ruled on a nexus finding his fear of persecution is a fear of being a victim of crime in Mexico and had no connection with any of the five grounds of persecution spelled out in the Convention. This conclusion was not challenged by the applicant. The focus of the tribunal's decision is on the applicability of section 97 of IRPA which reads:

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

protection of that country,

(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,

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

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

(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) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

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

Credibility

[11] The tribunal seemed not to doubt some aspects of Mr. Munoz's testimony (for example it believed him about his being extorted) writing: "The panel views Garcia's actions of extortions as a rogue policeman no differently from extortions from criminal gangs on persons perceived to be wealthy."

[12] Yet, under a heading in its decision entitled: "Well-foundedness of the claimant's fear" it wrote this was a determinative issue and found "a material aspect of the claimant's story hard to believe" for the following reasons: (1) he never told his boss – the owner of the dealership – about the extortions nor sought his help, a step the panel views "as a reasonable expectation in view of the circumstances"; (2) since he never filed a denunciation with the police or other law enforcement authority regarding the extortions, there is no documentary corroboration of his story; and, (3) his parents, who were approached by people looking for their son, did not complain to the police and did not provide him with corroborating documentation to support the statements. After emphasizing

once again, it found it hard to believe he would not have sought the advice/assistance of the owners of the dealership because the dealership was key to the extortions the tribunal concluded:

> "On the basis of the foregoing the panel is not persuaded, on the balance of probabilities, to believe that the extortions and threats on him by Garcia did occur and even that Garcia is looking for him and or/his wife and child to this day." [Emphasis mine.]

Generalized risk

[13] The tribunal began by stating: "If the foregoing were not the issue, generalized risk would be expressing the view paragraph 97(1)(b) of IRPA does not extend protection to those facing a risk that is generally faced by others in that country finding Mr. Munoz, and by extension his family, fit this description for the following reasons: (1) based on the evidence, "being a victim of crime and violence at the hands of rogue policemen and criminal gangs in the country is a "prevalent" or "widespread" risk generally faced by residents of Mexico", [adding] "as an affluent and successful member of society he would be perceived as wealthy, and if believed, the reason why he would be victimized by Garcia for extortion."; and, (2) it relied on the case of *Vickram v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 457 (*Vickram*) for the propositions: (a) what Mr. Vickram faced was criminal activity; (b) which was not greater than that faced by the population at large; and, (c) the perception of wealth did not constitute a particularized risk under section 97." It also relied on *Prophète v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 331 (*Prophète*) for the determination "the risk of all forms of criminality is general and felt by all Haitians" and "while a specific number of individuals may be targeted more frequently because of their wealth, all Haitians are at risk of becoming the victims of violence." The tribunal concluded:

> Based on the foregoing, the panel is of the view that the risk faced by the claimant, if the story that he was victimized by Garcia were true,

> is criminal activity and is a generalized and prevalent risk faced by all those businessmen perceived to be wealthy and by the population at large. As such, the claimant's risk as described is an excluded risk.
>
> [Emphasis mine.]

The existence of an internal flight risk alternative (IFA)

[14] According to the tribunal, the availability of an IFA was also conclusive against the claimants. The tribunal's focus was on Mr. Munoz's claim Mr. Garcia would have access to the updated information on their Voter Registration Cards (VRC) to trace him. Relying on documentary evidence, the tribunal concluded there was no substantial evidence of VCR database use to trace individuals.

[15] As for the three named cities where the Munoz family could seek refuge, the tribunal wrote:

> As for the possible internal flight alternative cities, either of Guadalajara or Monterrey or Tijuana, each have thriving populations with civic services to assist inhabitants with their social and security needs. Taking into consideration the two-pronged test in *Rasaratnam* and *Thirunavukkarasu*, the claimants could easily blend into the mass of people in the possible internal flight alternative city, with the potential to live comfortably without having to hide.
>
> The panel is, therefore, satisfied that it is not more than likely that the claimants would be found by Garcia, if he was pursuing them, in the proposed internal flight alternative and finds that conditions in the alternative city are such that it would not be unreasonable, in all the circumstances, for the claimants to seek refuge there. [Emphasis mine.]

The Arguments

(a) From the applicants

(1) The implausibility finding

[16] Counsel for the applicant first focuses on the single implausibility finding from which the tribunal inferred it did not believe "that the extortions and the threats on him by Garcia did occur and in any event that Garcia is looking for him or his wife and child to this day". The tribunal drew this implausibility finding because his story it found it hard to believe for the factors set out in paragraph 12 of these reasons.

[17] Counsel for the applicant submits this implausibility finding is unreasonable in the light of the evidence and specifically: (1) the tribunal did not refer to the explanation why he did not inform the owner of the dealership about the extortion or seek help. His explanation was not inherently implausible; (2) it erred in making the implausibility by basing it upon a lack of corroborating evidence; (3) the inference drawn is unreasonable in the light of the evidence – the facts and the evidence on the record; and, (4) the applicant was denied natural justice when he was prevented from explaining further why he did not approach the owners of the dealership.

(2) Generalized risk

[18] The applicant submits the tribunal erred by misreading the law when it relied on *Vickram* and *Prophète*. The facts before it showed his targeting by Garcia was not random but specific to him.

(3) The IFA

[19] The applicants submit the IFA finding is flawed because: (1) it applied the wrong standard of proof by requiring the applicant to demonstrate it was “more than likely” the applicants would be found by Garcia; and, (2) the tribunal’s conclusions are erroneous: (a) that although Garcia would have access to information through government databases, due to the volume of information contained in such, “it would be impractical to search within the database for information on a specific individual given the current limits of data processing technology”; and (b) in the three named cities in Mexico “each have thriving populations with civic services to assist inhabitants with their social and security needs”. The applicants submit these findings are made without regard to the documentary evidence.

(b) From the respondent:

[20] Counsel for the respondent in written argument, submits the tribunal’s finding the applicants’ claims were not well founded was entirely reasonable particularly in the context there was no documentary proof of the extortions and of the allegation that the principal applicant was sought. The respondent submitted referring to all of the evidence is not a requirement and cited *Boulis v. Canada (Minister of Manpower and Immigration)*, [1974] S.C.R. 875 “reasons are not to be read microscopically; it is enough they show that they have a grasp of the issues”.

[21] There is no basis for the argument natural justice was breached. A reading of the transcript shows the tribunal or the tribunal officer did not attempt to limit the principal applicant’s testimony but was trying to get him to focus on his answers.

[22] On the issue of generalized risk, counsel for the respondent submits the applicants faced "a generalized risk faced by those businessmen perceived to be wealthy and by the population at large", a finding which was open to it on the evidence since it was shown Mr. Garcia belonged to a large organized criminal gang and was part of a large group that came to the dealership. Based on his own evidence, his job at the dealership was a successful one, the tribunal's finding he would be perceived to be wealthy was justified. She pointed to recent judgments of this Court that support the proposition indiscriminate at random are not preconditions to a finding of a generalized risk.

[23] Lastly, counsel argued the IFA finding was reasonable. The respondent submitted "although the Board may have articulated the wrong standard of proof in the fourth paragraph at page six of its reasons, a review of the reasons demonstrate – it did not hold the applicant to a higher burden than the balance of probabilities. Counsel stressed the fact there was no evidence of concrete examples where Voter Registration cards had been used to trace an individual. Counsel did acknowledge, however, the applicants had pointed out to contrary evidence but argued that should not sway the Court because it appeared the applicants were dissecting the evidence and using only those which favoured its side.

[24] In its further memorandum of argument, the respondent argues the correct test was used to gauge the IFA. Counsel for the respondent writes: "The Board uses this phrase not to articulate any kind of test but rather to comment on something else – an absence of reliable evidence in relation to the Applicant's assertion that Garcia would find the Applicants anywhere in Mexico. The Board makes this point clear when it states: "….. the panel is not persuaded that it [referring to government databases] can be used by Garcia, if he were even inclined to do so, to track down the claimants

within Mexico and finds on a balance of probabilities, that it cannot be or is not used for that purpose."" Counsel for the respondent adds when the decision as a whole is read, it is clear the Board applied the correct test for an IFA and the tribunal's decision is reasonable.

The Standard of Review

[25] Questions of breach of natural justice or applying the right legal test raise questions of law which must be considered on the basis of correctness.

[26] Where the question before the Court involves findings of fact, the standard is reasonableness taking into account what Justice Binnie said in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 that paragraph 18.1(4)(d) of the *Federal Courts Act* provides legislative precision to the reasonableness standard namely a high degree of deference.

Analysis and Conclusions

(1) Unreasonable implausibility finding

[27] In its written and oral submissions, counsel for the respondent did not seriously engage the Court on this point and, in substance, abandoned the point to concentrate on the issue of the wrong test for the assessment of the generalized risk under paragraph 97(1)(b) of IRPA and the wrong standard of proof in addition to the correctness of the IFA finding.

[28] In any event, I find the applicants' arguments compelling on this issue as set out in counsel's written representations. Counsel correctly stated the law on implausibilities and applied it fairly to evidence. I agree with counsel for the respondent, however, in her written representations, there was

no breach of natural justice in the manner the tribunal handled the issue of the cut-off by the Tribunal Officer of the principal applicant's explanation why he did tell the owners of the dealership about the extortions. The applicants' objection to the implausibility finding is therefore sustained.

(2) Generalized risk

[29] The tribunal relied on the *Vickram* and *Prophète* cases in support of its finding the risk the applicants were facing was "generally faced by other individuals in Mexico".

[30] The *Vickram* case involved an Indo-Guyanese claimant whose refugee claim was refused. He had testified he believed he had been targeted because of his wealth. The tribunal held the acts of violence he suffered were "random criminal acts faced generally by civilians."

[31] In *Vickram*, my colleague Justice de Montigny pointed to Mr. Vickram's testimony he was a well-established business man with a big home and was making lots of money. Justice de Montigny held the tribunal correctly instructed itself on the law "which says the risk faced must not be indiscriminate or random and one faced generally by the entire population. The panel concluded the risk Mr. Vickam faced was of criminal activity, and that the risk was no greater than that faced by the population at large." [Emphasis mine.]

[32] I agree with counsel for the applicants, the extortion and threats which Mr. Munoz alleges were not random. Mr. Munoz was specifically and personally targeted by Mr. Garcia because of his unique position – the head of sales at a car dealership which is why Garcia and his friends came

there. If returned, Mr. Munoz does not fear being subject to random acts of violence by unknown criminal gangs. He fears Mr. Garcia.

[33] The tribunal's reliance on *Prophète* is also misplaced. There is no evidence on the record Mr. Garcia extorted Mr. Munoz because he was wealthy. In fact, the last demand he made was for a free new car. I could find no evidence in which Mr. Munoz testified he was a wealthy man. Being successful does not mean that person is wealthy.

[34] *Prophète* is of no assistance to the respondent. At the Federal Court of Appeal, cited *Prophète v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31, [2009] F.C.J. No. 143, that Court held a section 97(1) claim requires an individualized inquiry to be conducted on the basis of the evidence by a claimant "in the context of a present or prospective risk for him" which supports the applicants' submission of specificity and uniqueness. The applicants' objections are sustained on this point.

(3) The IFA

[35] Counsel for the respondent argued the three findings made by the tribunal were in the alternative and if the applicants failed on one of them, this Court could not intervene. The IFA was the finding which the respondent emphasized was unimpeachable. Counsel for the respondent submitted the tribunal's IFA finding was reasonable; it was basically a finding of fact which is owed great deference. Its further memorandum of argument is limited to the IFA. In that memorandum, counsel characterizes the applicants' submission "as nothing more than a game of semantics" presumably referring to the issue of the correct standard of proof. As noted, the nub of this argument

is whether the tribunal required a higher standard of proof than the balance of probabilities to enable the applicants to discharge their onus.

[36] The tribunal's finding was expressed in this way:

> The panel is, therefore, satisfied that it is not more than likely that the claimants would be found by Garcia, if he was pursuing them, in the proposed internal flight alternative and finds that conditions in the alternative city [*sic*] are such that it would not be unreasonable, in all the circumstances, for the claimants to seek refuge there. [Emphasis mine.]

[37] In *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706, Justice Mahoney speaking for the Federal Court of Appeal noted the concept of an IFA is inherent in the definition of Convention refugee which led him to formulate the first proposition of the IFA test as: "I would, accordingly, restate the first proposition: the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which if finds an IFA exists." [Emphasis mine.]

[38] Even accepting the respondent's argument that "not more than likely" means in the balance of probabilities the tribunal still erred. Restated his finding is to this effect "the panel is satisfied on the balance of probabilities (more likely than not) the claimants would be found by their persecutor Garcia". This is not the proper test. The test is serious possibility of being found.

[39] With respect, this is not a matter of semantics but goes to the hearth of the distinction between sections 96 and 97 of IRPA. In *Rasaratnam*, the Court makes it clear the concept of IFA is

associated with section 96 and not 97 where the risks are indeed tested on the balance of probabilities.

[40] I find another error, even assuming the tribunal was correct in its analysis of the VRC issue. The tribunal erred in providing no analysis on the second branch of the IFA test – whether it would be unreasonable for the claimants to move to one of those cities. The tribunal simply expressed a conclusion. This lack of analysis is particularly egregious in the absence of a finding of adequate state protection in Mexico. The applicants' objection on this issue succeeds

[41] For these reasons, this judicial review application must be allowed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is allowed. The tribunal decision is quashed and the applicants' claim is to be reconsidered by a differently constituted tribunal. No certified question was proposed.

"François Lemieux"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

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