Federal Court  Cour fédérale

Date: 20100525

Docket: IMM-5081-09

Citation: 2010 FC 550

Ottawa, Ontario, this 25th day of May 2010

Before: The Honourable Mr. Justice Pinard

BETWEEN:

Heydi Vanessa LOPEZ MARTINEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the "Act") of a decision by Board member Rena Dhir of the Refugee Protection Division of the Immigration and Refugee Board (the "Board"), dated September 23, 2009, wherein the applicant's claim for refugee protection was refused.

[2] The applicant, Heydi Vanessa Lopez Martinez, is a 21-year-old woman who is a citizen of Honduras and at all material time was a resident of Tegucigalpa. She claims refugee protection on the basis of fear of persecution by the Mara Salvatrucha 13 (hereinafter the "*maras*" or "MS-13"), one of the two main criminal gangs in Honduras. More particularly, she fears being forcibly recruited to the *maras* as well as fearing sexual assault, serious harm or death at the hands of the *maras*. This is a claim based on membership in a particular social group.

[3] The Board found the applicant to be credible. The following is a summary of the events precipitating the applicant's choice to flee Honduras.

[4] In August 2007, just after turning 19, two men from the *maras* raped her. She identified them as members of the *maras* by their tattoos as they were not known to her personally. They threatened to kill her and that her mother, with whom she lived alone, would pay if she told anyone what happened. She attended a medical clinic in Honduras on August 21, 2007 seeking medical treatment in response to her rape.

[5] Over the next few months the gang members stalked her. She quit her job to avoid them. In April 2008 she was again sexually assaulted by these *maras* members. At that time they informed her that she must join the gang. In order to do this, she would have to present a virgin girl to their boss and have to kill someone. They burned a cigarette onto her leg to demonstrate their seriousness. She supplied corroborating medical evidence from a doctor in Vancouver, British Columbia who had examined her scar and identified it as being caused by a first degree burn from a cigarette.

[6] During the time of the assaults, the applicant did not alert her mother or the police.

[7] On June 3, 2008 the applicant fled Honduras for fear of persecution by the gang in response to her refusal to join them. Members of *maras* went to the applicant's home, assaulted and threatened her mother and demanded to know her whereabouts and threatened to kill her. While it is not clear from the transcript whether the members of the *maras* were the same as the persons who had previously raped and sexually assaulted the applicant, the Board member found that they were.

[8] Upon reaching Guatemala, the applicant called her mother and told her everything. Her mother then filed a police complaint against the two *maras* members and left Tegucigalpa and has been living with relatives ever since. A copy of the police complaint, filed on June 20, 2008, was submitted to the Board. The applicant testified at the Board's hearing that neighbours report to her mother that the *maras* have continued to make inquiries as to the applicant's whereabouts. The mother, living with relatives, has not been directly contacted or found by the *maras* since leaving her home. However, she is unable to work for fear of the *maras*.

[9] The applicant reached Canada after traveling through Guatemala, Mexico and the United States. She made her refugee claim on July 26, 2008 after she was arrested for being in Canada illegally.

[10] Since arriving in Canada, the applicant has been diagnosed with Post-Traumatic Stress Disorder and has received counseling.

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[11] The Board stated that the determinative issue was whether the applicant had an Internal Flight Alternative ("IFA") in San Pedro Sula, Honduras. The Board member found the applicant credible and did not doubt any aspect of her story such that she accepted all explanations to the inconsistencies between the applicant's Personal Information Form and her oral testimony.

[12] The Board concluded that the applicant could have availed herself of an IFA in San Pedro Sula, Honduras "and it is not objectively unreasonable to seek refuge in this city".

[13] The sole issue in this matter is whether the Board erred in concluding that San Pedro Sula was a reasonable IFA for the applicant.

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[14] The standard of review of the Board's decision to find an IFA is reasonableness (see *Campos Navarro v. The Minister of Citizenship and Immigration*, 2008 FC 358 at paragraphs 12 to 14, and *Estrella v. The Minister of Citizenship and Immigration*, 2008 FC 633, at paragraph 9).

[15] The test for a finding of an IFA is well-established in the jurisprudence (*Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (C.A.); *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589 (C.A.)). There are two prongs that must be satisfied by the Board before an IFA will be accepted. On a balance of

probabilities, (1) there is no serious possibility of the applicant being persecuted in the proposed IFA and (2) that in all the circumstances, including the circumstances particular to the claimant, the conditions in the proposed IFA are such that it is not unreasonable for the claimant to seek refuge there.

[16] The Board identified the source of the applicant's risk of future persecution in San Pedro Sula as the two *maras* gang members who had targeted her and not the *maras* generally.

[17] The Board accepted, albeit with no reference to the documentary evidence, that gang members are found in every city in Honduras and that gang violence is a serious risk faced by all citizens of Honduras. This finding is consistent with the information contained in the *U.S. Department of State 2008 Human Rights Report: Honduras*:

> . . . Year-end statistics indicated that there were approximately 36,000 gang members, many of them minors. The NGO Washington Office on Latin America estimated that gangs were responsible for 15 percent of violent crime in the country. Gang membership was primarily confined to the Tegucigalpa and San Pedro Sula areas.

[18] In addition, the United States Agency International Development report, "Central America and Mexico Gang Assessment Annex 3: Honduras Profile", describes the phenomenon of gang violence in Honduras and emphasizes that gangs are entrenched in Tegucigalpa and San Pedro Sula:

> . . . Gangs established themselves in Tegucigalpa in the 1980s. MS-13 became prominent in Honduras in 1989; 18th Street became prominent in 1993. These two gangs are now well entrenched, particularly in Tegucigalpa and San Pedro Sula, where they are responsible for many crimes.

[19] It is clear from the documentary evidence that San Pedro Sula is one of two cities, separated by only 200 kilometers, which make up the key territories of the *maras* and their rival gang, 18th Street.

[20] Despite this evidence, the Board concluded that there was no serious possibility that the applicant would be persecuted in San Pedro Sula. The Board determined that there was no evidence that the *maras* members, identified as the persecutors, forcibly recruit individuals outside their specific neighbourhood of Tegucigalpa. This inference, combined with the Board's assessment that the applicant was not a particularly high profile person of interest for the *maras* members, supported its ultimate conclusion that it was reasonable for the applicant to relocate to the other key urban territory of this gang.

[21] In my opinion, the Board's suggestion of San Pedro Sula as a safe place for the applicant to relocate is problematic as it is not supported by the documentary evidence or the applicant's testimony.

[22] The evidence in the record is that the individual persecutors are members of a national gang, the *maras*, responsible for violent crime throughout the country. The two key cities for the *maras* are Tegucigalpa and San Pedro Sula yet the Board does not acknowledge the entrenchment of the gang in San Pedro Sula. In her testimony at the hearing, the applicant stated that *maras* gang members had been inquiring about her whereabouts as recently as one week prior to the hearing. This suggests that they had sustained interest to obtaining information about her whereabouts for close to a year and is evidence which contradicts the Board's assertion that the *maras* would not

sustain interest in locating her. The applicant also testified that the gang targets those who refuse to join with revenge killings and informed the Board that she had witnessed this kind of revenge violence through the murder of her neighbour who had refused to join the *maras*. Furthermore, it was the applicant's assertion that the *maras* would persecute her upon return despite relocation to another city.

[23] While I do not propose that the Board is under an obligation to provide justification for selecting the city it did initially, given the absence of any discussion as to why living in the other key territory of the gang did not put the applicant's life and personal safety at serious risk, in my opinion, it was unreasonable for the Board to conclude that San Pedro Sula was a viable IFA. No documentary evidence was cited to support the Board's assertion that recruitment is localized and from my review of the record I am unable to find direct support for that fact.

[24] The respondent suggests that the fact that the gang members have been routinely asking the applicant's former neighbour in Tegucigalpa whether she knows of the applicant's whereabouts and the fact that the applicant's mother has not yet been found or directly approached by the *maras* is a reasonable factual basis upon which to infer that those members do not operate outside that specific neighbourhood of Tegucigalpa. It is a tenuous link and is unreasonable in light of the applicant's accepted testimony.

[25] The applicant testified that the *maras* gang had the ability to find out she had returned to San Pedro Sula:

> Q: And if you had moved to another city, how would they find you?
> A: Under my name, the way I look. They have so many ways of finding a person.
> Q: You were asked if they were still in the neighbourhood and you said that your friend Myra said they were still in the neighbourhood looking for you. Is that correct?
> A: Yes.
> Q: It seems that they haven't gone to any other city looking for you.
> A: They're waiting for one to return. When they find that they can't find any more information on my neighbour's part, they're going to look for me. They must be looking for me. They have to find me.
> Q: Do they know where you are today?
> A: No.
> Q: Now, if you returned to Honduras and lived in another city like San Pedro Sula, how would they know you had returned to Honduras, if they don't even know that you're in Canada?
> A: They're big groups and they have all the possibilities about how to find a person. Maybe this can sound a little compromising, even the police is – they're part of them.

[26] According to the applicant, the logical inference from the evidence before the Board of the *maras* gang's entrenchment in San Pedro Sula and the close proximity between her home town and the proposed IFA is that her whereabouts would eventually become known to the specific members who had targeted her in the past. This same reasoning was used by Justice Barnes in *Ng'aya v. The Minister of Citizenship and Immigration*, 2006 FC 1136 at paragraph 14 to quash a Pre-Removal Risk Assessment decision wherein the officer had held that the applicant had an IFA from serious risk of persecution from her father and his associates in the Mungiki cult. While notably, there was the added fact that the applicant and her persecutor were related, I do not consider the facts of the instant case wholly distinguishable from *Ng'aya*.

[27] In regard to the Board's characterization of the risk faced by the applicant, I note Justice Yves de Montigny's reasoning in *Pineda v. The Minister of Citizenship and Immigration*, 2007 FC 365. In *Pineda*, this Court had cause to review a section 97 decision wherein the Board concluded that the applicant was not a person in need of protection:

> [15] Under these circumstances, the RPD's finding is patently unreasonable. It cannot be accepted, by implication at least, that the applicant had been threatened by a well-organized gang that was terrorizing the entire country, according to the documentary evidence, and in the same breath surmise that this same applicant would not be exposed to a personal risk if he were to return to El Salvador. It could very well be that the Maras Salvatruchas recruit from the general population; the fact remains that Mr. Pineda, if his testimony is to be believed, had been specifically targeted and was subjected to repeated threats and attacks. On that basis, he was subjected to a greater risk than the risk faced by the population in general.

Despite the fact that the context of the Board's inference was with respect to a different legal test, this decision is of assistance in assessing the logic of the Board's reasons in this case.

[28] The only issue decided by the Board in the case at bar was the existence of the IFA in San Pedro Sula. The Board correctly identified the IFA to be determinative of both a claim for protected status pursuant to section 96 as well as section 97 of the Act. To the extent that the Board uses its conclusion that a risk of *maras* gang violence is a generalized risk to refute the applicant's assertion that she would be persecuted in the proposed IFA, the reasoning in *Pineda, supra*, illustrates such assumed generalization to be faulty. This is not to say that the applicant faces a particular risk of violence which is equivalent to a positive determination on the first branch of the IFA. Rather, it undermines one of the premises the Board uses to get to its ultimate conclusion that there is no serious possibility of persecution in San Pedro Sula by the *maras*.

[29] I conclude, therefore, that the Board's conclusion with respect to the first prong of the IFA is unreasonable. This is sufficient to quash the Board's decision without having to consider the Board's analysis under the second prong of the IFA test.

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[30] For all the above reasons, the application for judicial review is granted, the decision of Board member Rena Dhir is quashed and the matter is sent back for redetermination by a differently constituted Board.

JUDGMENT

The application for judicial review is granted. The decision rendered on September 23, 2009 by Board member Rena Dhir of the Refugee Protection Division of the Immigration and Refuge Board is quashed and the matter is sent back for redetermination by a differently constituted Board.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-5081-09
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