

Federal Court



Cour fédérale

Date: 20100729

Docket: IMM-86-10

Citation: 2010 FC 793

Vancouver, British Columbia, July 29, 2010

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

**CLAUDIA ISABEL HIDALGO TRANQUINO
JOHANNA GABRIELA COLORADO HIDALGO**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Claudia Isabel Hidalgo Tranquino and her daughter Johanna sought refugee protection in Canada based upon Ms. Hidalgo's alleged fear of criminal gangs in El Salvador who, she says, had specifically targeted her because of her work as a prosecutor in that country.

[2] The Refugee Protection Division of the Immigration and Refugee Board dismissed the applicants' claim on the basis that Ms. Hidalgo lacked the subjective fear necessary to support a claim under section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The Board

further found that the risk the applicants faced was generalized in nature, and thus did not provide a basis for protection under section 97 of the Act.

[3] For the reasons that follow, I find that the Board erred in its analysis. Consequently, the application for judicial review will be allowed.

The Section 96 Claim

[4] Ms. Hidalgo described the threats that had been made to her life and that of her daughter by members of the Mara 18, Mara Salvatrucha and MS gangs, which she says, were the result of her work as a lawyer involved in gang prosecutions. She also described the extreme fear and desperation that she felt as a result of these threats.

[5] The Board made no negative credibility findings with respect to Ms. Hidalgo's evidence. However, the Board found that she lacked subjective fear of persecution based upon her failure to seek refugee protection during the two years that she spent in the United States before coming to Canada.

[6] While the failure of an applicant to seek protection elsewhere may indeed provide a basis for a finding of a lack of subjective fear, the Board's finding in this case was unreasonable. Ms. Hidalgo explained why she did not make a refugee claim in the United States. The Board seemingly accepted her explanation as truthful, but nevertheless found it to be "inconsistent with a well-founded fear of persecution".

[7] As the Federal Court of Appeal observed in *Shanmugarajah v. Canada (Minister of Employment and Immigration)*, 34 A.C.W.S. (3d) 828, [1992] F.C.J. No. 583, at paragraph 3 “it is almost always foolhardy for a Board in a refugee case, where there is no general issue as to credibility, to make the assertion that the claimants had no subjective element in their fear...”.

See also Justice Dawson’s comments in *Ribeiro v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1363, 143 A.C.W.S. (3d) 147 at para.11.

[8] Having accepted Ms. Hidalgo’s evidence as truthful, including the explanation that she provided for her failure to claim elsewhere, it was simply unreasonable for the Board to dismiss her claim for protection under section 96 on the basis that she lacked subjective fear.

The Section 97 Claim

[9] Because the Board made no finding as to whether the applicants belonged to a particular social group and thus had a nexus to a Convention ground, it is therefore necessary to also deal with the applicants’ arguments with respect to the Board’s section 97 analysis.

[10] In this regard, the Board found that although Ms. Hidalgo had adduced evidence to show that she and her daughter were personally subject to risk in El Salvador, the risk that they faced was a generalized one faced by others in that country, including other lawyers working on gang prosecutions.

[11] The respondent relies on the Federal Court of Appeal's decision in *Prophète v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31, 387 N.R. 149 to say that the Board's finding in this regard was one that was reasonably open to it on the record before it.

[12] Citing its earlier decision in *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, 329 N.R. 346 at paragraph 33, the Federal Court of Appeal observed in *Prophète* that "section 97 is meant to afford protection to an individual whose claim 'is not predicated on the individual demonstrating that he or she is [at risk] ... for any of the enumerated grounds of section 96'": at paragraph 6.

[13] The Federal Court of Appeal further found that to be a person in need of protection, an applicant has to show the Board that his or her removal to the country in question would subject him or her personally, in every part of that country, to a risk to his or her life, or to a risk of cruel and unusual treatment, that is not faced generally by other individuals in or from the country in question: *Prophète* at para. 3.

[14] *Prophète* mandates that the Board carry out an individualized inquiry with respect to the issue of forward-looking risk, on the basis of the evidence adduced by the applicant: at para. 7.

[15] The respondent argues that the risk asserted by Ms. Hidalgo was specifically tied to her employment, and that having resigned from the prosecutor's office, she should no longer be at risk in El Salvador. There are two difficulties with this argument. The first is that it formed no part of the

Board's analysis. The second is that it flies in the face of the Board's finding that Ms. Hidalgo had adduced evidence to show that she and her daughter were personally subject to risk in El Salvador.

Conclusion

[16] For these reasons, the application for judicial review is allowed.

Certification

[17] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a differently constituted panel for re-determination; and
2. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-86-10

STYLE OF CAUSE: CLAUDIA ISABEL HIDALGO TRANQUINO et al. v.
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: July 27, 2010

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

DATED: July 29, 2010

APPEARANCES:

Dean Pietrantonio FOR THE APPLICANTS

Helen Park FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dean D. Pietrantonio FOR THE APPLICANTS
Barrister & Solicitor
Vancouver, BC

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada
Vancouver, BC