Federal Court  Cour fédérale

Date: 20101021

Docket: IMM-6313-09

Citation: 2010 FC 1029

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 21, 2010

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

WILL ALBERTO GARCIA ARIAS

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the IRPA) of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated November 19, 2009, which rejected the applicant's claim for refugee protection and found that he was neither a refugee within the meaning of section 96 of the IRPA nor a "person in need of protection" within the meaning of section 97 of the IRPA.

Background of the claim for refugee protection

[2] The applicant is a 24-year old young man and a citizen of El Salvador. His claim for refugee protection was based on his fear of being the victim of intimidation and reprisals from the members of gangs he refused to join. The applicant stated that he had been subject to repeated pressure from members of two rival gangs, the Mara Salvatrucha and the Mara 18, and fears that he will again be asked to join a gang if he returns to El Salvador.

[3] The applicant explained that he was accosted by members of both of these gangs on a number of occasions and pressured to join them. He stated that he was approached by gangs a number of times since 2004, when he was living in the city of Dolores and going to school. At that time, he was between 16 and 17 years old.

[4] He left school in 2005, when his father had an accident and he had to replace him at work on the family farm in San Vicente, approximately 45 minutes away from Dolores. He stayed there for a year, during which time the gangs did not bother him.

[5] In February 2006, the applicant moved to the city of Villa Colon, where his cousin asked him to work with her as a corn deliverer. While they were making a delivery, they were stopped and threatened by the members of a gang, who forced them to abandon their merchandise because their boss had not paid the [TRANSLATION] “rent” he owed them. The gang members told them not to return.

[6] The applicant then worked with his cousin, who had a small vegetable business. On April 12, 2006, while accompanying his cousin to make purchases at the market, they were stopped by five or six gang members who asked them whether they belonged to a rival gang and encouraged them to join them. The applicant claims that he told the gang members that they would think about it, after which the gang let them go.

[7] The applicant then decided to leave El Salvador. He arrived in the United States in October 2006 and remained there until he presented himself at the Canadian border on August 27, 2007.

Impugned decision

[8] The Board first analyzed the applicant's claim under section 96 of the IRPA. It is important to note that the Board did not question the applicant's credibility. After acknowledging that gangs mainly recruited young men from impoverished areas and that the applicant matched this profile, the Board ruled that the applicant was a member of a particular social group within the meaning of section 96, that is, that of "young men". The Board further ruled that the applicant would not face a serious possibility of being persecuted should he return to El Salvador and, consequently, refused to grant him Convention refugee status.

[9] The Board then analyzed his claim for refugee protection under section 97 of the IRPA and determined that the applicant was not a "person in need of protection" because he failed to establish that he was personally more at risk than the general population.

Issues

[10] This application for judicial review raises the following issues:

1. Did the Board err in applying the wrong standard of proof in its analysis of the objective component of the fear of persecution invoked by the applicant under section 96 of the IRPA?
2. Did the Board err in determining that the applicant would not face a serious possibility of persecution should he return to El Salvador?
3. Did the Board err in its application of section 97 of the IRPA by determining that the applicant had not shown that he was more at risk than the general population of El Salvador?

Standard of review

[11] The first issue essentially raises a question of law that is reviewable on the standard of correctness: *Sekeramayi v. Canada (Citizenship and Immigration)*, 2008 FC 845, [2008] F.C.J. No. 1066; and *Mugadza v. Canada (Citizenship and Immigration)*, 2008 FC 122, [2008] F.C.J. No. 147).

[12] The second issue involves the assessment of evidence and the findings of fact made by the Board and will therefore be reviewable on the standard of reasonableness: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, and *Dunmsuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[13] As far as the third issue is concerned, case law has established that Board decisions on the application of section 97 of the IRPA are also reviewable on the standard of reasonableness: *Perez v. Canada (Citizenship and Immigration)*, 2010 FC 345, [2010] F.C.J. No. 579; *Marcelin Gabriel v. Canada (Citizenship and Immigration)*, 2009 FC 1170, [2009] F.C.J. No. 1545; and *Ventura De Parada v. Canada (Citizenship and Immigration)*, 2009 FC 845, [2009] F.C.J. No. 1021.

[14] The analytical framework which the Court must use when applying the standard of reasonableness is well described by the majority in *Dunsmuir*, at paragraph 47:

> **47** Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Analysis

1. *Did the Board err in applying the wrong standard of proof in its analysis of the objective component of the fear of persecution invoked by the applicant under section 96 of the* IRPA*?*

[15] Section 96 of the IRPA reads as follows:

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, (*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 (*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	**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*) 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*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[16] The applicant acknowledged that it was his responsibility to demonstrate that his fear of persecution was well founded. To do so, the applicant argued that he had to establish a [TRANSLATION] "reasonable possibility" of persecution should he return to El Salvador. The applicant alleged that although the Board stated the proper test at paragraph 7 of its decision, it, in fact, placed a much heavier burden of proof on him by linking its finding about the serious possibility of persecution to its findings as to whether recruitment to gangs was systematically forced or not.

[17] The applicant based his argument on the following excerpts from the decision. At paragraph 7, the Board described the applicable test for assessing the applicant's objective fear: "Could the claimant face, upon his return to his country of origin, a serious possibility of being

persecuted?" The Board then stated at paragraph 12 of its decision that the issue it was concerned about was the following: ". . . is the recruitment of young people to gangs in El Salvador systematically forced or not?"

[18] After having analyzed the documentary evidence submitted and the applicant's version, the Board found as follows:

> [13] . . . The panel is of the opinion that this treatment received by the claimant confirms the DOS report that the forced recruitment of young men such as the claimant is not systematic. The panel is of the opinion that there is no serious possibility that the claimant will be persecuted should he return to his country of origin.

[19] The applicant submits that the Board asked the wrong question: it did not have to determine whether the recruitment to gangs was systematically forced, but rather whether the applicant had shown that there was a reasonable possibility of his being persecuted by gangs if he returned to El Salvador.

[20] The respondent submitted that the Board applied the proper test and that the issue regarding the systematic nature of the forced recruitment methods used by gangs was a question of fact relevant to determining whether there was a serious possibility that the applicant would be persecuted.

[21] I agree with the respondent.

[22] Case law has developed criteria for assessing the objective fear of persecution described at section 96 of the IRPA.

[23] In *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, the Supreme Court, while examining the definition of Convention refugee under the former *Immigration Act*, R.S.C. 1985, c. I-2, set out the standard of proof applicable to the objective component of the alleged fear:

> **120** Both the existence of the subjective fear and the fact that the fear is objectively well-founded must be established on a balance of probabilities. In the specific context of refugee determination, it has been established by the Federal Court of Appeal in *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680, that the claimant need not prove that persecution would be more likely than not in order to meet the objective portion of the test. The claimant must establish, however, that there is more than a "mere possibility" of persecution. The applicable test has been expressed as a "reasonable possibility" or, more appropriately in my view, as a "serious possibility". . . .

[24] This same criterion was applied regarding the interpretation of section 96 of the IRPA in *Sekeramayi v. Canada (Citizenship and Immigration)*, 2008 FC 845, [2008] F.C.J. No. 1066.

[25] In this case, it is my view that the Board applied the proper test and that whether or not gangs engaged in systematic forced recruitment was one of the elements which the Board considered in its assessment of whether there was a serious possibility of persecution.

[26] It is clear from paragraph 7 of the decision that the Board knew which test to apply, since it described it correctly. It reiterated this test in the conclusion it reached from its analysis of the

evidence at paragraph 13: ". . . The panel is of the opinion that there is no serious possibility that the claimant will be persecuted should he return to his country of origin."

[27] I consider that in this case it was not unreasonable for the Board to question whether or not forced recruiting practices by gangs existed. The applicant's claim for refugee protection is specifically based on his fear of being subject to pressure and intimidation from gang members to join their gang and on his fear of reprisals should he refuse to join. It therefore does not seem unreasonable to me that the Board assessed the risk of the applicant's again being subject to solicitation and pressure from gangs seeking to recruit him by conducting an analysis of the documentary evidence on gang recruitment methods and, more specifically, systematic, forced recruitment.

[28] In addition, the Board did not restrict its analysis to the documentary evidence on the systematic nature of gangs' forced recruitment practices. It also assessed both the circumstances in which the applicant was approached by gang members and his profile. On this point, the Board noted that the period during which the applicant was persistently approached coincided with the period when he attended school and was under 18.

[29] The Board also determined that the two incidents described by the applicant after he had left school had been random and that during the first incident there had been no question of recruitment, and during the second, the applicant had managed to leave "without being constrained or threatened". After analyzing the evidence and referring to these last two incidents, the Board reached the following conclusion:

> [13] . . . Thus, once outside the school and his neighbourhood, the claimant was allegedly subject to a fortuitous recruitment request and could have left the scene without being constrained or threatened. The panel is of the opinion that this treatment received by the claimant confirms the DOS report that the forced recruitment of young men such as the claimant is not systematic. The panel is of the opinion that there is no serious possibility that the claimant will be persecuted should he return to his country of origin.

[30] I therefore consider that the Board applied the proper test and that it did not place a heavier burden of proof on the applicant than that developed in case law.

2. *Did the Board err on the basis of the evidence in determining that the applicant would not face a serious possibility of persecution should he return to El Salvador?*

[31] The applicant essentially faulted the Board's decision on three grounds. First, he claimed that the Board erred in its assessment of the documentary evidence regarding recruitment practices and that a reasonable analysis of the evidence would have led it to the conclusion that forced recruitment did exist and that the applicant was likely to be the target of such practices.

[32] With respect, I consider that the Board's analysis of the evidence is not unreasonable. The Board acknowledged that the evidence regarding gang recruitment methods and the existence of forced recruiting practices was contradictory. The Board clearly referred to the documentary evidence that differed from the findings of the report of the United States Department of State (DOS), but it preferred the findings of the DOS report, which it considered to be consistent with the applicant's own experience. The Board found that "this forced recruitment [was] not systematic across all of El Salvador, but it [could] occur in certain

regions". I find that the Board's determination was based on the evidence and that it is one of the possible, acceptable outcomes considering the evidence.

[33] The applicant also criticized the Board for acknowledging that forced recruitment existed in certain regions of El Salvador, without specifying in which ones. In my view, the Board conducted a macroscopic analysis of the situation by asking whether gangs in general engaged in systematic forced recruitment, and to answer that question, it did not have to identify the regions in which forced recruitment systematically took place.

[34] The applicant also submitted that through its decision, the Board acknowledged that the applicant would be persecuted if he returned to school. Counsel for the applicant submitted that the applicant had left school because of the pressure from gangs and that the Board's decision effectively confirms that he had to leave school to avoid persecution. This suggestion seems incorrect to me.

[35] First, in his testimony before the Board, the applicant stated that he left school because his father had had an accident and he had had to replace him, not because he was fleeing gang harassment, although he did describe the unrelenting pressure he was under at school.

[36] Second, the Board did not infer anything other from the fact that the applicant was no longer attending school than that he had been subject to the most persistent pressure while he attended school and that the incidents he described that had occurred after he left school were restricted to two random encounters.

[37] The applicant also criticized the Board for erring in stating that during the last incident with gang members, he had managed to leave “without being constrained or threatened”. Counsel for the applicant submitted that the applicant had managed to leave by promising to join the gang. With respect, this suggestion is not quite correct.

[38] In his interview at the port of entry, the applicant stated that he had told the gang members who accosted them that they would think about the gang members’ proposal to join them. At his hearing before the Board, the applicant described his encounter with the gang members as follows:

> [TRANSLATION]
> So we were asked: what are you doing here? What would we do (inaudible). Lift your shirts, you belong to the 18. So I lifted my shirt. Come on, where do you come from? Give me your wallet. Ah, Dolores, where’s that? I said Cabanias. Ah, the MS is strong too. I said, yes, I’m with them there, but here, I’m with you. Why don’t you stay here, you filthy (. . . inaudible . . .). I said, no, I’m working with my cousin. You see, he’s here, because they separated us back there.
>
> Where does your cousin live? I said that he lived in Colon. Why don’t you stay here with us? The police—here, we give the orders. We give the orders in this area.
>
> MEMBER (to the claimant)
>
> Q. And then what?
>
> A. I said, what do you think? So, so, as if everything returned to normal. They calmed down. So we continued. So I said, if I wanted to contact you to belong to this area? So we continued making purchases. They were still in the area. So we, we left, we left, and I contacted my sister who’s in the United States so I could travel to the United States and then to Canada.

[39] Although it is accurate to say that the applicant succeeded in calming matters down through his nuanced answers, the Board's finding that the applicant managed to leave "without being constrained or threatened" does not seem unreasonable to me, considering the evidence.

[40] Therefore, in my view, as a whole, the Board's findings of fact are reasonable, justified and supported by the evidence. The Board ruled that, on the basis of the documentary evidence regarding forced recruitment practices by gangs, the applicant's experiences and his current profile, there was no serious possibility that he would be persecuted if he returned to El Salvador. The Court must show deference to the Board's analysis, and no intervention is warranted in this case.

3. *Did the Board err in its application of section 97 of the* IRPA *by determining that the applicant had not shown that he was more at risk than the general population of El Salvador?*

[41] The applicant submitted that the fact that his profile matches the group of individuals targeted by gangs, combined with his experiences, show that his risk of being persecuted if he returns to El Salvador is greater than that faced by the population in general.

[42] The Board based its finding that the applicant's risk was generalized on *Prophète v. Canada (Citizenship and Immigration)*, 2008 FC 331, [2008] F.C.J. No. 415, and on the evidence. The Board's reasoning can be found at paragraph 16 of its decision:

> [16] Furthermore, the panel is of the opinion that the claimant did not establish that he was more at risk than the general

> population. After finishing school, the claimant was reportedly randomly approached by the gangs while he was delivering food for his job. On one occasion, they allegedly tried to extort money from his cousin and then they took the goods; the second time, they reportedly checked whether they belonged to the opposing gang, while stating that he and his cousin should join the gang. The claimant did not demonstrate that he was personally targeted and that he was at greater risk than the general population. Since his departure from El Salvador, the evidence does not indicate that he is being sought. Thus, following the analysis in *Prophète* the claimant's risk, upon returning to his country of origin, of facing gangs and being a victim of criminality is a generalized risk that is shared by the entire population.

[43] In my view, the Board's finding is based on the evidence and consistent with the current state of the law on the issue of personalized risk.

[44] Paragraph 97(1)(*b*) of the IRPA does not confer any protection on persons who face a risk faced generally by the other persons in a country:

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 :
. . .	[…]
(*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,	(i) elle ne peut ou, de ce fait,

because of that risk, unwilling to avail themself of the protection of that country,	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 international standards, and	(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) 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.

[45] The Court has had several occasions to rule on the concept of personalized risk in a context in which the risk in question is faced by the population in general or by a significant portion of the population. In *Prophète*, Justice Tremblay-Lamer stated, as follows, the applicable principles:

> [18] The difficulty in analyzing personalized risk in situations of generalized human rights violations, civil war, and failed states lies in determining the dividing line between a risk that is "personalized" and one that is "general". . . .
>
> . . .
>
> [23] . . . the applicant does not face a personalized risk that is not faced generally by other individuals in or from Haiti. The risk of

> all forms of criminality is general and felt by all Haitians. 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.

[46] The applicant argued that the Board erred in determining that the risk he faced was comparable to that facing the general population since the evidence clearly showed that he was part of the subgroup of "young men" which is more at risk than the general population. Although the Board referred to the "general population", it is obvious that its analysis of the risks faced by the applicant was conducted within the context of the file, that is, the risks related to gang recruitment methods among the subgroup of young men. The case law of this Court has recognized that the risk facing a large subgroup of a population corresponds to a generalized risk within the meaning of section 97 of the IRPA. Justice Pinard wrote the following in *Marcelin Gabriel v. Canada (Citizenship and Immigration)*, 2009 FC 1170, [2009] F.C.J. No 1545:

> [20] A generalized risk need not be one experienced by every citizen. A subgroup can face a generalized risk. This was clear to Madam Justice Judith Snider in *Osorio v. Minister of Citizenship and Immigration*, 2005 FC 1459. The Court was asked to consider parents in Colombia as a specific group that is targeted as victims of crime, specifically, child abduction. The Court noted that the category of "parents" is significantly broad and the risk is a widespread or prevalent risk for all Colombian parents (at paragraph 25). The applicants in that case could not personalize the risk beyond membership to that subgroup and this did not satisfy the Court. Thus, a generalized risk could be one experienced by a subset of a nation's population thus, membership in that category is not sufficient to personalize the risk.

[47] The fact that the applicant was solicited by gangs when he was in El Salvador is not sufficient to show that his risk was personalized or greater than the risks faced by all other young men in El Salvador. In *Innocent v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1019, [2009] F.C.J. No. 1243, the applicant also invoked the fact that the risk to which

she was subject was personalized because she had been personally targeted by a gang of thugs. The Court refused to infer from the applicant's experience that the risk of violence which she was subject to was therefore greater than that faced by all other Haitian citizens perceived as rich. Justice Mainville wrote the following:

> [66] However, there remains the alternative argument advanced by counsel for the applicant, i.e., that the applicant was directly targeted by a gang of thugs who attacked her three times. Thus, according to her counsel, the applicant would be subject to a personalized risk that goes beyond the risk faced by those who are perceived as rich since, in her particular case, she was personally and directly targeted.
>
> [67] A person victimized by crime is not, based on that fact alone, a person in need of protection under section 97 of the Act. It depends on the circumstances of each case: *Cius v. Canada (Citizenship and Immigration)*, above, at paragraphs 3, 4 and 23, *Acosta v. Canada (Citizenship and Immigration)*, above.
>
> [68] Moreover, the personalized risk analysis must be prospective. In the circumstances of this case, it is unlikely that the applicant will be subject to a personalized risk by the same band of thugs almost 4 years after the incidents in question. However, it is not the Court's task to carry out this prospective analysis, but the panel's. The panel found that "according to the evidence adduced before it, the risk to which the claimant could be subjected is a generalized risk affecting the entire population of the country and not a personalized risk . . ." (decision, at para. 18).

[48] *Perez v. Canada (Citizenship and Immigration)*, 2010 FC 345, [2010] F.C.J. No. 579, involved facts similar to those in this case: the applicant was a young Honduran who had also been accosted and intimidated by gangs who wanted him to join them, and who feared being persecuted by these gangs should he return to his country. Justice Boivin wrote the following regarding the generalized nature of the risk facing the applicant:

> [36] The fact that the recruitment is personal does not necessarily mean that the risk is personalized. It does not mean that the activity is not one which is not faced generally by other individuals since, as mentioned by the Board, “the very nature of recruitment is putting individual people into organisation”.
>
> [37] The documentary evidence demonstrates that gangs are a serious problem in Honduras and that most people are at some risk from them. As for recruitment faced by the applicant, the Court is of the view that, based on the evidence, a large subset of the population, basically all young men, are at risk of recruitment strategies similar to that alleged by the applicant and this was considered by the Board.
>
> . . .

[49] I agree with these principles and find them to be entirely applicable in this case.

[50] I therefore conclude that the Board conducted an analysis based on the evidence and that it did not make any errors warranting an intervention by the Court. The Board’s conclusions fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* and *Khosa*).

[51] For these reasons, the application for judicial review is dismissed. The parties posed no question for certification.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Marie-Josée Bédard"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

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