

Federal Court



Cour fédérale

Date: 20110718

Docket: IMM-6617-10

Citation: 2011 FC 894

Ottawa, Ontario, July 18, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

JESUS RENE LOPEZ ALFARO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of Berto Volpentesta of the Immigration and Refugee Board (the Board) dated September 10, 2010 wherein the Applicant was determined to be neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Based on the reasons that follow, this application is dismissed.

I. Background

A. *Factual Background*

[3] Jesus Rene Lopez Alfaro (the Applicant) is a citizen of El Salvador. He is from Tejutepeque and was born on April 25, 1990. In early 2008 (variously reported as February, April or June), he was approached by members of the Mara 18 gang (also called the Ms 18). They told the Applicant that he had to join their gang or they would kill him. Several weeks later, different members of the same gang approached the Applicant and again threatened to kill him if he did not join their gang. The Applicant told his mother, who took him to the police to report the threats.

[4] In June 2008, the Applicant and a cousin fled to the United States, where they were detained and deported back to El Salvador. The Applicant fled to the United States again in August 2008, and successfully made his way to Canada. He arrived in Canada on October 14, 2008 and claimed refugee protection because of the Mara 18's threats.

[5] Twelve days before the hearing, the Applicant provided the Board with further documents to support his claim, including a letter from the Mayor of Tejutepeque and from the National Civil Police in that city.

B. *Impugned Decision*

[6] The Board found that the Applicant's claim was not credible because he had given conflicting reports of when he was first approached by the gang members and because he had not provided the original police report. The Board considered the letters from the police commander and the Mayor, but rejected them because they merely repeated what the Applicant's mother had told the authors rather than stating the authors' personal knowledge. The Board found that, even if his claim was credible, the Applicant had not established a nexus to a Convention ground and the risk he faced was a generalized one.

II. Issues

[7] The issues before the Court are:

- (a) Is the Board's credibility determination reasonable?
- (b) Is the Board's determination that the risk faced by the Applicant is generalized reasonable?
- (c) Does the Board's section 97 determination violate section 7 of the Charter and, if so, is it saved by section 1?

III. Standard of Review

[8] The Applicant's submissions do not address the standard of review, although the Applicant argues that the credibility determination is unreasonable. As to the second issue, the Applicant argues that the risk determination is incorrect, unreasonable and unconstitutional.

[9] The Respondent argues that the reasonableness standard applies, citing *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 47 which states that a reasonable decision is one that is justifiable, transparent and intelligible and that falls within the range of acceptable outcomes defensible in fact and in law.

[10] More specifically, I note that credibility findings attract deference and are therefore reviewable on a reasonableness standard (see *Ukleina v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1292, 2009 CarswellNat 4343 at para 7) as are determinations about whether a risk is generalized (see *De Parada v Canada (Minister of Citizenship and Immigration)*, 2009 FC 845, 2090 CarswellNat 2944 at para 19). I would also add that constitutional issues are reviewable on the correctness standard (see *Dunsmuir* at para 58).

IV. Argument and Analysis

A. *The Board's Credibility Determination is Reasonable*

[11] The Applicant submits that the credibility determination is unreasonable because of the Mayor's letter, which refers to the police report indicating that the Applicant was targeted by the Mara 18. The Applicant argues that, because of this reference to the police report, it was unreasonable for the Board to reject the Mayor's letter on the basis that it merely repeated what his mother said. The Applicant concedes that it was open to the Board to reject the police letter on this basis. The Applicant argues that the Board did not question the genuineness of the Mayor's letter, and that it therefore constitutes reliable evidence that he had been targeted by the Mara 18 gang.

[12] The Applicant submits that it was unreasonable for the Board to draw an adverse inference from his failure to produce the original police report. The Applicant argues that the Board should have considered the fact that he was only 18 years old when he fled El Salvador, and that he does not know why his mother did not obtain the original police report.

[13] The Applicant further submits that his testimony was straightforward and consistent, and that the Board's focus on one inconsistency (that is, when the Mara 18s first approached him) is overly microscopic. He cites *Attakora v Canada (Minister of Employment and Immigration)* (1989), 99 NR 168, 15 ACWS (3d) 344 (FCA) and *Owusu-Ansah v Canada (Minister of Employment and Immigration)* (1989), 8 Imm LR (2d) 106, 98 NR 312 (FCA), which state that the Board should not take an overly microscopic approach to assessing a claimant's evidence. The

Applicant argues that it was unreasonable for the Board to expect him to recall what month he was approached, citing a study demonstrating the inaccuracy of memory that was not before the Board.

[14] The Respondent submits that the credibility determination is reasonable given the Applicant's failure to explain his inconsistent answers about when he was first approached by the gang and his failure to provide a copy of the police report. The Respondent argues that it was open to the Board to give the letters little weight. The Respondent argues that the Board's rejection of the Mayor's letter is reasonable because the letter does not give specifics, and that nothing turns on this rejection because the Board accepted that the Applicant had been threatened by the gang (at page 7, para 19 of the Respondent's Memorandum).

[15] In his reply, the Applicant notes that the Respondent's statement that the Board accepted the threats is in error, and that the Board actually found that "the claimant was not himself threatened by gang members" (at para 9). The Applicant argues that the Respondent cannot supplement the Decision, citing *Qi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 195, 79 Imm LR (3d) 229 at para 35.

[16] The memory study, though interesting, was not before the Board and so should not render the credibility determination unreasonable. The Refugee Protection Division (RPD) Screening Form (found at pages 46 and 47 of the Certified Tribunal Record) informed the Applicant that his credibility would be at issue at the hearing, and he could have put this evidence before the Board but he did not.

[17] The letter is reproduced in the Applicant's Record, and the certified translation is found at page 36. The portion referred to by the Applicant is the statement that the Applicant "has been threatened by members of a gang, according to a national police report of this city." Although it is true that the Mayor's letter attests to the existence of the police report, it was still open to the Board to draw a negative inference based on the Applicant's failure to produce the report itself. Even if the Mayor's letter is taken as proof of the existence of a police report, it does not provide sufficient details to be sure that the report relates to the same incidents which form the basis of the Applicant's claim.

[18] Although the Applicant has argued that his testimony was straightforward and consistent, the transcript shows several inconsistent answers from the Applicant (see, for example, pp 190-1 and 194 of the Certified Tribunal Record). The Board was best placed to evaluate the Applicant's demeanour at the hearing, and these inconsistencies support the reasonableness of the credibility determination.

[19] It was open to the Board to disbelieve the Applicant's claim based on the inconsistent answers about when the threats began. The Applicant's claim is a simple one – he was only approached twice over the span of a few months before he fled to Canada. His situation is not analogous to those in the decisions he cited, where the claim was based on a more complex factual situation and the Board honed in on one detail of many.

[20] The Applicant has not demonstrated that the credibility determination is unreasonable.

[21] Given my conclusion with request to the Board's credibility finding, there is no need to consider the other issues raised by the Applicant in this matter. Counsel for the Applicant correctly conceded that the issue with respect to the generalized risk and the related Charter issue were both dependant upon a successful challenge to the reasonableness of the Officer's credibility finding. While it may be tempting to join the debate concerning the possible limits of what properly constitutes generalized risk pursuant to section 97 it is clear that each case will turn on its particular facts and in this case no such factual foundation exists.

V. Conclusion

[22] No question was proposed for certification and none arises.

[23] In consideration of the above conclusions, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6617-10

STYLE OF CAUSE: JESUS RENE LOPEZ ALFARO v. MCI

PLACE OF HEARING: TORONTO

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**REASONS FOR JUDGMENT
AND JUDGMENT BY:** NEAR J.

DATED: JULY 18, 2011

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