

Federal Court



Cour fédérale

Date: 20110616

Docket: IMM-4043-10

Citation: 2011 FC 707

Ottawa, Ontario, June 16, 2011

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

EDWIN OMAR MALDONADO LAINEZ

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Mr. Edwin Omar Maldonado Lainez, is a citizen of Honduras. He claims that his life will be in danger if he is forced to return to Honduras. He alleges that the Mara Salvatrucha gang, also known as the “Mara 18” and the “MS 18,” threatened him with death if he refused to join that gang. After receiving two such threats, he fled Honduras. Upon his arrival in Canada in November 2008, he claimed refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] In June 2010, the Refugee Protection Division (RPD) of the Immigration and Refugee Board rejected his claims.

[3] The Applicant submitted that the RPD erred by:

- (i) determining that there was no nexus between his stated fears and the Convention refugee ground of membership in a particular social group, namely, young males who are targeted for membership in the MS 18;
- (ii) determining that his claimed risks are “faced generally by other individuals in or from Honduras,” as contemplated by paragraph 97(1)(b)(ii) of the IRPA; and
- (iii) ignoring certain evidence in reaching its decision.

[4] For the reasons that follow, I have concluded that the RPD did not commit any of those alleged errors. Accordingly, this application is dismissed.

I. Background

[5] Mr. Maldonado Lainez (“Lainez”) claims that, in May 2005, when he was 16 years old, he was physically assaulted and robbed of his wallet by two members of the MS 18 as he was leaving work. He allegedly suffered a knife wound to his hand and was also knocked unconscious for a period of time. He claims that he reported the incident to the police approximately one week later, but was told that since he could not provide a thorough description of his attackers and because there were no witnesses, they could not follow up on his report.

[6] Mr. Lainez further claims that on November 27, 2006, he was approached again by three members of the MS 18 as he was leaving church. He alleges that on that occasion, his wallet was

stolen, he was told that he had to join the gang within 10 days if he wanted to live, and he was instructed to report to the gang's boss in the village of Trinchera.

[7] In addition, Mr. Lainez claims that, approximately one week later, on the morning of December 4, 2006, he discovered that a motorcycle he had borrowed from his brother had been severely damaged at some point during the night. He claims that there was a note attached to the motorcycle which stated: "This is proof that we know where you live and you only have a few days left to join the Mara."

[8] On December 5, 2006, Mr. Lainez fled Honduras. He travelled through Mexico and entered the United States on January 16, 2007. During his stay in the United States, he did not make a claim for asylum, allegedly because he feared that his claim would be rejected and that he would then be deported to Honduras. He remained with relatives in the United States until he heard about the availability of refugee protection in Canada.

II. The Decision under Review

[9] At the outset of its decision, the RPD stated that the determinative issue in respect of Mr. Lainez's claim for protection under section 96 of the IRPA was whether there was a nexus between his stated fears and one of the five grounds of protection set forth in that section. Those grounds are race, religion, nationality, political opinion and membership in a particular social group.

[10] The RPD began its assessment of this issue by noting that Mr. Lainez fears that the MS 18 will harm or kill him because he did not comply with their demand to join the gang. After briefly reviewing Mr. Lainez's allegations, the RPD stated that his "decision to flee was because he did not want to be a victim of the gang." It then concluded that Mr. Lainez was "a victim of crime," and that

therefore his stated fear is not linked to any of the five Convention refugee grounds set forth in section 96.

[11] The RPD then considered Mr. Lainez's claim under section 97. It noted that: (i) the assessment of risk under section 97 must be specific to the individual, in that the evidence must establish a specific, individualized risk of harm with regard to the particular claimant; and (ii) the risk must not be indiscriminate or random and one faced generally by the population of the country in question. It added that the fact that a group of people may be victimized by criminals repeatedly or more frequently than others does not satisfy the requirements of section 97 if that risk is faced generally by others in the country.

[12] The RPD proceeded to note that the Applicant was victimized because he was "spotted by gang members as a suitable person to rob as he was walking alone on a street." It concluded that "he had no particular characteristic except that he was unfortunately walking alone on both occasions when the gang members were looking for someone to rob." It then observed: "The second time the claimant was robbed, the gang members also attempted to recruit the claimant into their gang. However, this does not establish that the risk is not one that is faced generally by the population in Honduras."

[13] In the course of reviewing the documentary evidence, the RPD observed that: (i) the "failure to cooperate [with the MS 18] often leads to violence by gang members"; (ii) gangs and the MS are a widespread problem in Honduras; and (iii) membership is based on individuals' proximity to gangs in their community, rather than resulting from an official recruitment process.

[14] Ultimately, the RPD found that the risk identified by Mr. Lainez is one that is faced generally by others in Honduras. It therefore rejected his claim for protection under section 97 of the IRPA.

III. Standard of review

[15] The issue of whether the Applicant demonstrated a nexus to a Convention ground is a question of mixed fact and law, reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 51-55; *Ariyathurai v Canada (Minister of Citizenship and Immigration)*, 2009 FC 716; *Jimenez Herrera v Canada (Minister of Citizenship and Immigration)*, 2010 FC 499). In short, the Officer's decision will stand unless it does not fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" or is not appropriately justified, transparent and intelligible (*Dunsmuir*, above, at para 47).

[16] The issue of generalized risk raised by the Applicant is also a question of mixed fact and law (*Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213, at paras 9-11), reviewable on a standard of reasonableness (*Dunsmuir*, above). To the extent that the RPD is required to interpret paragraph 97(1)(b)(ii) of the IRPA in conducting its assessment, that part of its analysis is also reviewable on a standard of reasonableness (*Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182, at paras 13-19).

IV. Analysis

A. *Did the RPD err in concluding that the alleged persecution faced by Mr. Lainez has no nexus to a Convention ground of protection recognized in section 96 of the IRPA?*

[17] Mr. Lainez submitted that the RPD erred in determining that there was no nexus between his stated fear of death if he were required to return to Honduras and the Convention ground of

membership in a particular social group, namely, young men who are targeted for membership in the MS 18 in that country.

[18] During his hearing before the RPD, when asked whether the MS 18 had approached or attempted to recruit any of the other members of his family, Mr. Lainez testified that they had been pursuing his sister. When asked why they had been pursuing her, he replied “the same reason as mine.” When the panel member then pointed out that she is not a male and that he had earlier stated that the MS 18 pursue young men to join their gang, he replied: “Well, the problem is they kill the [sic] whole families.” He later added: “[W]hat I really think is that they want to kill her because I am not there, and I said they kill entire families.”

[19] A short while later in the hearing, Mr. Lainez stated that nothing gets by the MS 18 and “that is why everybody [in Honduras] is so terrified, that is why everybody pays the war tax right now.” A few minutes later, he added: “One has to pay a war tax just to live; it does not matter, if they need more money sometimes yeah they will go and attack you, they will mug you.” He then observed that these types of incidents occur “daily.”

[20] Considering the foregoing testimony, together with the country documentation to which the RPD referred later in its decision, I am satisfied that it was reasonable for the RPD to conclude that Mr. Lainez was a victim of crime, rather than a member of a particular social group consisting of young men who are specifically targeted for robbery and violence by the MS 18 (*Castro v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1282, at paras 24-26; *Bacchus v Canada (Minister of Citizenship and Immigration)*, 2004 FC 821, at para 11).

[21] In short, it was reasonably open to the RPD to conclude, based on the evidentiary record, that Mr. Lainez was not targeted by the MS 18 because he was a young male. As the RPD subsequently explained, it found that he was robbed and assaulted because he was in the wrong place at the wrong time. Although the latter finding was discussed in connection with Mr. Lainez's claim under section 97 of the IRPA, the RPD's reasons must be read in their entirety (*Ragupathy v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151, at para 15; *Abdalla v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1429, at para 6; *Malveda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 447, at para 41).

[22] Having decided that the two robberies and assaults that he suffered were random, it was reasonable for the RPD to conclude that Mr. Lainez did not have a well founded fear of persecution, as contemplated by section 96, even though he may have been threatened, on one subsequent occasion, with death if he did not join the MS 18.

B. Did the RPD err in concluding that the risks alleged by Mr. Lainez are risks faced generally by other individuals in or from Honduras?

[23] Mr. Lainez submitted that the RPD erred by emphasizing the arbitrary nature of the robberies that he experienced and by failing to appropriately recognize that the generalized risk that it identified had developed into a personalized risk of death.

[24] In its assessment, the RPD determined that Mr. Lainez was victimized by the MS 18 because "he was unfortunately walking alone on both occasions when gang members were looking for someone to rob," and not because of any particularized characteristic. It noted that although the gang members also attempted to recruit him into their organization on the second occasion, this fact

alone did not establish that the risk he faced was not generally faced by other individuals in Honduras.

[25] The RPD proceeded to note that the documentary evidence indicates that gang violence is particularly acute and the MS 18 is particularly violent. In this regard, it noted:

- i. “The gangs typically have been involved in a number of criminal activities including murder, rape, kidnapping, human trafficking, drug trafficking, auto and weapons smuggling, robbery and extortion of residents, bus drivers and business owners.”
- ii. “The failure to cooperate often leads to harassment or violence by gang members,” and that “gang activity is prevalent throughout Honduras.”
- iii. “[T]here is no official recruitment process for the youngest members of gangs; rather, membership is based on their proximity to the gangs in their community.”

[26] The RPD then repeated its view that Mr. Lainez was victimized because he was in the wrong place at the wrong time, rather than because of any reason particularized to him.

[27] Even though the risk he identified may have become personalized to him, that risk is also faced by everyone in Honduras who, like Mr. Lainez, are initially victimized on a random basis and then become personally targeted when they refuse to cooperate. In this regard, the RPD found that “the failure to cooperate [with the gangs in Honduras] often leads to harassment or violence by gang members.” The RPD also found that: (i) gang activity is prevalent throughout Honduras; (ii) the rate of homicides, physical violence and crimes against property is “also prevalent”; and (iii) “gangs and the MS are a widespread problem.”

[28] Based on these findings, it was reasonably open to the RPD to conclude that Mr. Lainez does not face a personal risk that is not faced generally by others in Honduras, even though: (i) he may be part of a sub-group of the population that faces a heightened risk (*Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31; *Ventura De Parada v Canada (Minister of Citizenship and Immigration)*, 2009 FC 845, at para 22); and (ii) the risk he faces may have become personal to him by virtue of his refusal to join the MS 18 (*Guifarro*, above, at paras 30-33).

[29] Although Mr. Lainez took issue with the RPD's finding that the risk of death at the hands of the MS 18 is widespread in Honduras, I am satisfied that it was reasonably open to the RPD to make this finding on the basis of the evidentiary record. That record included a report by the United States Congressional Research Service entitled *Gangs in Central America*, dated August 2, 2007, which identified the MS 18 as a "major gang" and stated (at p. CRS-2) that "homicides have increased dramatically in El Salvador, Guatemala, and Honduras." That report also noted (at p. CRS-3), that "[t]he gang problem is most severe in El Salvador, Honduras, and Guatemala." Another document in the Certified Tribunal Record reported that there has been "increased violence" by gangs in Honduras, and that the "Honduran government has claimed that there are 340 active gangs in the country, with 30,000 members involved in drug trafficking, organized crime, and even international terrorism." Yet another report noted that killings by gangs extend beyond males, to include women who have "refused to work [for the gangs] or to complete certain missions."

[30] Having regard to the foregoing findings, the evidence in the Certified Tribunal Record, and the jurisprudence, I am satisfied that it was reasonable for the RPD to conclude that the risk faced by Mr. Lainez is a risk faced generally by other individuals in or from Honduras.

C. *Did the RPD err by ignoring significant evidence?*

[31] Mr. Lainez submitted that the RPD erred by ignoring his evidence that, on December 4, 2006, the motorcycle that he used for work was destroyed by the MS 18 gang and that the gang left a threatening note stating that he only had a few days left to join the gang.

[32] I disagree. As noted at paragraph 21 above, the RPD's decision must be read in its entirety. This evidence was explicitly referred to at the outset of the RPD's decision. I am therefore satisfied that the RPD did not ignore this evidence.

[33] On the particular facts of this case, it was not unreasonable for the RPD to fail to return to this evidence once it made the findings discussed in Parts IV.A and IV.B of these reasons. Upon making those findings, it was reasonably open to the RPD to reject Mr. Lainez's claims under sections 96 and 97 of the IRPA, without explicitly analyzing the potential significance of the one remaining and isolated incident of crime and harassment that he claimed to have suffered at the hands of the MS 18. This isolated incident cannot reasonably be claimed to have constituted a sufficiently "sustained or systemic violation of basic human rights" (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689, at para 63) to warrant an explicit analysis of whether Mr. Lainez's claimed fear of future persecution rose to the level of being well founded (*Alshynetsky v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1322, at para 5).

V. Conclusion

[34] The application for judicial review is dismissed.

[35] There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT this application for judicial review is dismissed.

“Paul S. Crampton”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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MINISTER OF CITIZENSHIP AND IMMIGRATION

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