

Federal Court



Cour fédérale

Date: 20110908

Docket: IMM-848-11

Citation: 2011 FC 1058

Ottawa, Ontario, September 8, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

ROBERTO STANLEY OLMEDO RAJO

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated January 18, 2011, concluding that the applicant is not a Convention refugee or person in need of protection pursuant to sections 96 or 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act) because his claims have no nexus to a Convention refugee ground and because he does not face a risk of cruel and unusual

treatment or punishment, or a danger of torture, nor does he face a risk to his life that is not generally faced by others in El Salvador if he is returned to El Salvador.

FACTS

Background

[2] The applicant is a citizen of El Salvador. He worked as a bus driver from 2003.

[3] Beginning in 2004, members of the Mara Salvatrucha gang (MS-13) began to demand “protection money” from the applicant in order to prevent them from attacking him. One day in September of 2004, the applicant was stopped by three gang members who demanded more than the usual sum. The applicant did not have the sum that they demanded and so they stabbed him. The applicant required medical treatment for his wounds.

[4] Following that first attack, the gang members repeatedly demanded additional money from the applicant. The applicant felt that he had no choice but to pay the money in order to keep his job and support his family. Some of the applicant’s colleagues were killed when they were not able to pay the money demanded by gang members. In addition, individuals who reported the murders to the police were killed as well.

[5] One day in February of 2007, the gang members again demanded additional money from the applicant. When he said that he could not pay, they held a gun to his head. In desperation, the applicant offered them the money that he had intended to use to pay his mortgage payments. They left him alone, but told him that he may be on their list of drivers to kill in 2007.

[6] The applicant was so infuriated by the incident that he stopped a passing police patrol car and reported the crime. When the police arrested the gang members, the gang threatened the applicant and his family with death.

[7] Four days following his report, the applicant was told that the three gang members who had attacked him, plus two others, had come looking for him. He decided not to go to work.

[8] After waiting five days, the applicant returned to work but was told that the gang members were still looking for him. He again returned home without working. After another three days, the applicant contacted his colleague to ask whether he could safely return, and was told that witnesses had reported that three of the applicant's colleagues had been killed by gang members when asked "where the applicant was" and said that they did not know the applicant.

[9] Traumatized, the applicant and his family moved to his sister's house in a city about 25 km away. When the applicant spoke to his former neighbour the next day, she told him that three armed gang members had gone to his house and said that his days were numbered. The applicant decided to flee.

[10] The applicant was only able to gather enough money to flee alone. He left his family in hiding at his sister's house. His son is not allowed to leave the house, even to attend school. On one occasion the applicant's wife returned to their old house to pick up some of their clothes and belongings. She was beaten by gang members, who only stopped the beating because neighbours came to her assistance. On April 30, 2008, his wife came to Canada and made a refugee claim. She subsequently returned to El Salvador and her claim was deemed abandoned.

[11] On May 23, 2010, the applicant's brother-in-law was murdered by gang members as part of the vendetta against the applicant.

Decision Under Review

[12] The Board reviewed the facts of the applicant's claim and accepted the applicant's credibility.

[13] The Board then considered whether the applicant had established a nexus to a ground for a claim under section 96 as a Convention refugee. The Board rejected the applicant's claim to be a member of a social group, specifically a group of individuals who are targeted by a gang for having reported them to the police. Relying on a series of decisions of this Court, the Board found that criminality, and even a targeted vendetta, does not establish a nexus to a Convention ground (references omitted):

¶12. There are a number of Federal Court cases, which have held that victims of crime, corruption or vendettas generally fail to establish a link between their fear of persecution and one of the Convention grounds in the definition of Convention refugee. The Board has been upheld in its finding a lack of nexus where the claimant was a target of a personal vendetta or where the claimant was a victim of crime.

[14] The Board also found that the applicant's occupation as a bus driver did not constitute membership in a social group. The Board found that "a social group should relate to who a person is rather than what they do", and that the applicant in this case had been targeted as a victim of general crime and because he had reported a crime to the police.

[15] The Board then considered whether the applicant had established on a balance of probabilities that he personally faces a risk to his life or a risk of cruel and unusual treatment or punishment if he returns to El Salvador, to gain protection under section 97 of the Act.

[16] The Board found that the risk faced by the applicant is one that is faced generally in El Salvador, and, therefore, that the applicant did not qualify for protection under section 97 of the Act:

18. ... What the claimant fears is a particularized or personalized instance of what is in fact a generalized risk – that is, a risk faced generally by others in and from El Salvador who are targeted by criminal gangs for the purposes of extortion.

[17] The Board found that the jurisprudence supported its finding that although the claimant may be personally at risk does not mean that he does not face generalized violence. In particular, the Board relied on *Acosta v. Canada (Citizenship and Immigration)*, 2009 FC 213. In that case, the applicant was also a bus driver facing threats from the Mara Salvatrucha gang, who demanded protection money from bus drivers (in Honduras) or else the gang threatened to kill the bus driver. The Court in *Acosta* upheld the Board's finding that although the applicant had been targeted and pursued by gang members, the risk that he faced was generalized. The Court in *Acosta* stated that the Board had considered the applicant's personal situation, but had reasonably concluded that he simply faced a heightened risk of what is a general concern.

[18] In this case, the Board found that the applicant was initially targeted for extortion because he was a bus driver. This, as found in *Acosta*, was a generalized risk. The Board then considered whether the risk that he subsequently faced after reporting the gang members to the police particularized or personalized that risk. The Board found that it did not. The Board stated that the second risk simply flowed from the first:

¶21. ...Consequently the risk that the claimant faced subsequent to his reporting gang members to police flows from the initial targeting under a generalized risk. I find that the claimant has not established that he has a personalized risk other than the personalized risk that is part of the generalized risk of gang violence in El Salvador which includes extortion and reprisals, including murder, of those who are not compliant with their demands or who report them to authorities.

[19] The Board cited additional jurisprudence in which the Court upheld the Board's findings that those who are targeted by gangs nevertheless face generalized risks: *Mejia v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 12; *Velasquez v. Canada (Citizenship and Immigration)*, 2009 FC 109; *Ventura De Parada v. Canada (Citizenship and Immigration)*, 2009 FC 845; and *Prophète v. Canada (Citizenship and Immigration)*, 2008 FC 331.

[20] The Board reviewed the documentary evidence and found that based upon the documentary evidence and the applicant's testimony, the applicant had established a risk to his life, but that it was a risk faced by others in El Salvador:

¶26. Extortion and murder, are part of MS-13 modus operandi and constitute a widespread risk for all citizens of El Salvador. Unfortunately, the claimant is one of their victims. The fact that the claimant has been identified personally as a target of a vendetta for complaining to police does not remove him from the generalized risk category.

[21] The Board concluded that on a balance of probabilities the applicant is not a person in need of protection under section 97 of the Act.

LEGISLATION

[22] Section 96 of the Act, grants protection to Convention refugees:

96. A Convention refugee is a 96. A qualité de réfugié au sens

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 themselves 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

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.

[23] Section 97 of the Act grants protection to persons whose removal from Canada would subject them personally to a risk to their life, or of cruel and unusual punishment, or to a danger of torture:

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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

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 :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

- (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
- (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,
- (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
- (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

- (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
- (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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

ISSUES

[24] The applicant raised the following issue:

Did the Board err in finding that the applicant is not a person in need of protection because his risk was generalized?

STANDARD OF REVIEW

[25] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to “ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be

accorded with regard to a particular category of question”: see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at para. 53.

[26] The Board’s assessment of whether the applicants face a particularized or generalized risk is a question of mixed fact and law subject to review on a reasonableness standard: see, for example, *Acosta*, above, at paragraph 11.

[27] In reviewing the Board's decision using a standard of reasonableness, the Court will consider “the existence of justification, transparency and intelligibility within the decision-making process” and “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir*, supra, at paragraph 47; *Khosa*, supra, at para. 59.

[28] Questions of procedural fairness are determined on a standard of correctness.

ANALYSIS

Issue 1: Did the Board err in finding that the applicant is not a person in need of protection because his risk was generalized?

[29] The applicant submits that the Board made three errors in coming to its conclusion that the applicant faced a generalized and not a personalized risk. First, the applicant submits that the Board’s finding that the applicant faced the same risk as that faced by the general population contradicts the Board’s finding that the applicant is not a Convention refugee because he was the victim of a vendetta. The Court does not accept this submission.

[30] Second, the applicant submits that the Board erred in finding the applicant as a person at risk as any other bus driver. Instead, the applicant submits that he was part of a subgroup of “bus drivers

who report to police against those engaged in extortion” and, more specifically, those who report to the police in the presence of the extortionists.

[31] The applicant submits that in all of the cases relied on by the Board, the individuals were victims of gangs who targeted them because of their refusal or inability to pay the extortion money demanded. Because none of those individuals reported the extortionists to the police, especially in the presence of the extortionists, the applicant submits that their risks were less personalized than the applicant’s case.

[32] Instead, the applicant submits that the following cases are more similar to the applicant’s situation:

- a. *Aguilar Zacarias v. Canada (Citizenship and Immigration)*, 2011 FC 62: In this case, the applicant was a vendor in a street market who was extorted by a member of a gang in Guatemala. The applicant and a fellow vendor reported the gang member to the police. The gang informed both men that the gang knew that they were the informants and that they would be killed. In a subsequent confrontation, the applicant’s fellow vendor was shot and killed but the applicant managed to escape. Justice Noël found that the Board erred in finding that the applicant did not face a personalized risk. Relying on Justice de Montigny’s decision in *Martinez Pineda v. Canada (Citizenship and Immigration)*, 2007 FC 365, Justice Noël stated the following:

¶17. As was the case in *Martinez Pineda*, the Board erred in its decision: it focused on the generalized threat suffered by the population of Guatemala while failing to consider the Applicant’s particular situation. . . . It appears that the Applicant was not targeted in the same manner as any other vendor in the market: reprisal was sought because he had collaborated with authorities, refused to comply with the gang’s requests and knew of the circumstance of Mr. Vicente’s death.

- b. *Munoz v. Canada (Citizenship and Immigration)*, 2010 FC 238: In this case, the manager of a car dealership was extorted by a police officer who wanted a free car. Justice Lemieux found that the Board had erred in applying *Prophète* to find that the applicant’s risk was generalized, because there was no evidence that the applicant had been targeted because of his wealth. Justice Lemieux found that the facts demonstrated that the applicant faced a personalized risk:

¶32. I agree with counsel for the applicants, the extortion and threats which Mr. Munoz alleges were not random. Mr. Munoz was specifically and personally targeted by Mr. Garcia because of his unique position – the head of sales at a car dealership which is why Garcia and his friends came there. If returned, Mr. Munoz does not fear being subject to random acts of violence by unknown criminal gangs. He fears Mr. Garcia.

¶33. The tribunal’s reliance on *Prophète* is also misplaced. There is no evidence on the record Mr. Garcia extorted Mr. Munoz because he was wealthy. In fact, the last demand he made was for a free new car. I could find no evidence in which Mr. Munoz testified he was a wealthy man. Being successful does not mean that person is wealthy.

- c. *Cruz Pineda v. Canada (Citizenship and Immigration)*, 2011 FC 81: In this case, a delivery driver from Honduras was repeatedly attacked by gang members. I found that the Board failed to consider the applicant’s evidence of the specific risk that he faced – namely, “retribution” for slights to gang members and an attack on the applicant’s brother-in-law.

[33] Finally, the applicant submits that the Board erred in appearing to doubt the applicant’s evidence that his brother-in-law had been killed as a result of hiding the applicant in his house while ignoring the corroborating evidence submitted by the applicant.

[34] The respondent submits that the Board made no error. The respondent submits that the Board reasonably relied on the cases that it cited in support of its finding that the applicant faces only a generalized risk in El Salvador. The respondent relies on *Paz Guifarro v. Canada (Citizenship and Immigration)*, 2011 FC 182, in which Justice Crampton upheld the finding of the Board that a truck driver in Honduras who had ultimately refused to pay extortion money, reported the extortion to the police, and subsequently faced threats, nevertheless faced a generalized risk. Justice Crampton crystalized the legal distinction between personalized risk and generalized risk under section 97 of the Act in paragraph 33 of his Reasons for Judgment as follows:

¶33. Given the frequency with which claims such as those that were advanced in the case at bar continue to be made under s. 97, I

find it necessary to underscore that is now settled law that claims based on past and likely future targeting of the claimant will not meet the requirements of paragraph 97(1)(b)(ii) of the IRPA where (i) such targeting in the claimant's home country occurred or is likely to occur because of the claimant's membership in a sub-group of persons returning from abroad or perceived to have wealth for other reasons, and (ii) that sub-group is sufficiently large that the risk can reasonably be characterized as being widespread or prevalent in that country. In my view, a subgroup of such persons numbering in the thousands would be sufficiently large as to render the risk they face widespread or prevalent in their home country, and therefore "general" within the meaning of paragraph 97(1)(b)(ii), even though that subgroup may only constitute a small percentage of the general population in that country.

When I apply this description of the law to bus drivers targeted like the applicant in the case at bar, it is clear that the applicant faced the same generalized risk of violence as all other transportation workers targeted by the gangs.

[35] The respondent submits that the Board in this case clearly considered the personal circumstances of the applicant, including accepting the applicant's evidence regarding the murder of his brother-in-law as true. The Court must agree.

[36] It is clear that the distinction between a generalized and personalized risk is a fine one that depends on the facts of each case. The Board has a duty to carefully consider all of the evidence presented by the applicant, and to consider whether the risk faced by the applicant in fact is the same as the risk faced by enough of the rest of the population to constitute a generalized risk. In this case, the Board reviewed all of the applicant's evidence, including his evidence regarding the murder of his brother-in-law. The Board nevertheless concluded that the risk was the same as that faced by all other bus drivers, which is a sufficiently large subgroup of the population. This finding of fact was reasonably open to the Board.

CONCLUSION

[37] For these reasons, this application for judicial review must be dismissed.

[38] No question is certified.

JUDGMENT

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

“Michael A. Kelen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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