

Federal Court



Cour fédérale

Date: 20110927

Docket: IMM-1055-11

Citation: 2011 FC 1107

Ottawa, Ontario, September 27, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

JUAN JOSE ASENCIO VENTURA

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 the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated January 7, 2011. The Board determined that the Applicant was not a Convention refugee or person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, RS 2001, c 27 (IRPA).

[2] For the following reasons, the application is dismissed.

I. Facts

[3] The Applicant, Juan Jose Ascencio Ventura, is a national of Guatemala. He claims to face persecution and a personalized risk of harm from a criminal gang known as the Mara Salvatrucha (MS-13).

[4] The Applicant operated a mini-market store in a suburb of Guatemala City. On May 1, 2008, he was approached on a bus by an individual claiming he was El Tata, a leader of the MS-13 gang. The individual said that he knew the Applicant was a businessman. He threatened the Applicant at gunpoint and demanded that he pay a “tax” of 500 quetzals immediately and on the first of each succeeding month. The Applicant did not have the money with him and the individual took his watch and wallet.

[5] That evening the Applicant reported the incident to the police who told him they could not do anything without more evidence. Four days later, the Applicant sold everything he could from the store, ceased operating his business, and moved approximately 50 kilometres away.

[6] On June 8, 2008, an unknown gang member tried to abduct the Applicant. The gang member suggested that the abduction was prompted by the report to the police. The Applicant was able to escape and return to his neighbourhood where he hid in a church parish hall.

[7] The Applicant fled Guatemala on June 10, 2008. He travelled through Mexico to the United States of America. He entered Canada on October 2, 2008 and filed a claim for refugee protection on January 29, 2009. Since leaving Guatemala, he has learned from his sister that unknown individuals are asking for his whereabouts.

II. Decision

[8] The Board determined that there was no nexus between the Applicant's fear of persecution at the hands of the MS-13 gang and one of the section 96 Convention grounds. The actions of MS-13 had solely criminal motives. Victims of crime do not generally establish a nexus to a Convention ground such as race, religion, nationality, political opinion, or membership in a particular social group.

[9] The Board rejected the Applicant's claim that he was a member in the particular social group of persons targeted by the MS-13 gang. There was no persuasive evidence to show that Guatemalan citizens who have been targeted because they are perceived as wealthy businessmen have been subjected to repeated and sustained violations of their core human rights sufficient to constitute a defined social group.

[10] In addition, the Applicant was not considered a person in need of protection under section 97 of the IRPA. The Board acknowledged that social violence was rampant in the country and certain professions were targeted more frequently by the MS-13, such as street vendors and merchants. Although the Applicant may have been personally at risk because he was targeted on

the perception that he had money, the specific risk he faced, extortion and violence at the hands of the MS-13, was no different than one faced generally by people in Guatemala.

III. Issues

[11] This application raises the following issues:

- (a) Was it reasonable for the Board to conclude that there was no nexus between the Applicant's fear of persecution and one of the Convention grounds?
- (b) Was the Board's determination that the Applicant was not a person in need of protection under section 97 reasonable?

IV. Standard of Review

[12] The nexus to a Convention ground is a question of mixed fact and law reviewable on a standard of reasonableness (see *Chekhovskiy v Canada (Minister of Citizenship and Immigration)*, 2009 FC 970, [2009] FCJ No 1180 at para 18). Contrary to the Applicant's submission, the interpretation of risk under section 97 also requires a reasonableness standard (see *Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213, [2009] FCJ No 270 at paras 10-11; *Guifarrao v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182, [2011] FCJ No 222 at paras 12-18).

[13] As articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47, reasonableness is "concerned mostly with the existence of justification, transparency and

intelligibility within the decision-making process” as well as “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

V. Analysis

Issue 1: Was it Reasonable for the Board to Conclude that there was No Nexus Between the Applicant’s Fear of Persecution and One of the Convention Grounds?

[14] The Applicant does not dispute the Board’s finding that a fear of criminals will not necessarily provide a nexus to a Convention ground. He does, however, propose that the Court consider whether business owners fleeing from the MS-13 in Central America establish a nexus as a “particular social group” under section 96, since they are more prone to be targeted for extortion.

[15] I agree with that the Respondent that there is no nexus among individuals targeted by the MS-13 gang to a particular social group. They do not meet the criteria established in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, [1993] SCJ No 74 as being (para 70):

[...]

- (1) groups defined by an innate, unchangeable characteristic;
- (2) groups whose members voluntarily associated for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

[16] It was reasonable for the Board to find that individuals targeted by the MS-13 are not members of a marginalized social group who face systematic discrimination. When asked to clarify why business people in particular are targeted by the MS-13, the Applicant was only able to conclude that the gang targets those it considers “prey.”. Criminal acts, such as the extortion committed by the MS-13 gang, do not generally establish a link between a fear of persecution and a Convention ground (see *Kang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1128, [2005] FCJ No 1400).

Issue 2: Was the Board’s Determination that the Applicant was Not a Person in Need of Protection Under Section 97 Reasonable?

[17] Subsection 97(1)(b)(ii) requires that a person in need of protection face a risk to life or of cruel and unusual treatment that “is not faced generally by other individuals in or from that country.”

[18] The Applicant submits that the Board failed to appreciate the heightened risk he faced of being targeted by the MS-13 gang as a small business owner. He relies on the decision of *Pineda v Canada (Minister of Citizenship and Immigration)*, 2007 FC 365, [2007] FCJ No 501 at para 15 where one student was found to have a greater risk than the risk faced by the general population from the MS-13 gang.

[19] *Pineda*, above, can, however, be distinguished from the present case. In that instance, the student was personally targeted and his family was subjected to repeated threats and attacks over a long period of time. This took him outside the generalized risk of violence in the country. The

Court made clear at paragraph 17 that the individual was not claiming a risk under a particular category as a student, young person or member of a wealthy family.

[20] The Applicant in this case was initially targeted because he was perceived as a wealthy small business owner. He claims to have been attacked a second time because he reported the incident to the police. Regardless, I agree with the Respondent that this does not take the Applicant outside the scope of a generalized risk. The Board acknowledged that while violence by the MS-13 gang was rampant, merchants were more frequent targets. The risk does not need to be faced by every person as long as it is prevalent and widespread (see *Osorio v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1459, [2005] FCJ No 1792). This Court has stated in *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, [2008] FCJ No 415, aff'd 2009 FCA 31, [2009] FCJ No 143 that section 97 can be interpreted to include a sub-group within the larger one that faces an even more acute risk. As in that case, the perception of the Applicant as a wealthy businessman could increase his chances of being victimized, but that does not mean the risk is no longer generalized.

[21] In addition, past threats to the Applicant as a small business owner by the MS-13 do not necessarily amount to a personalized risk (see *Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 991, [2010] FCJ No 1353 at para 18; *Perez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1029, [2009] FCJ No 1275 at para 34; *E.A.D.S. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 785, [2011] FCJ No 1110 at para 13).

[22] Since the Applicant can be viewed as facing the same generalized risk as other small business owners, it was open to the Board to conclude that he was not a person in need of protection under section 97.

VI. Conclusion

[23] The Board reasonably concluded that there was no nexus to a Convention ground or risk faced to the Applicant that would make him a person in need of protection.

[24] Accordingly, 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-1055-11

STYLE OF CAUSE: JUAN JOSE ASECIO VENTURA v. MCI

PLACE OF HEARING: TORONTO

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

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