Federal Court  Cour fédérale

Date: 20111014

Docket: IMM-2572-11

Citation: 2011 FC 1163

Vancouver, British Columbia, October 14, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

LENA ISABEL JIMENEZ PALOMO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Soon after Ms. Jimenez Palomo opened her bakery shop in Guatemala City, she attracted the attention of Mara Salvatrucha, often referred to as MS13, a gang of particularly vicious thugs with tentacles throughout Guatemala and other Central American countries. Initially, their demands for protection money were only half-hearted as her business was not yet up and running.

[2] Some years later, more particularly in 2007, as she appeared to be successful, the gang demanded protection money, “war tax”, call it what you will. She refused.

[3] She was beaten up and threats were levied both against her and her family. She complained to the police. They said they could not really help her. Her life would be better if she simply paid up. She continued to refuse.

[4] Over the next two years matters escalated. Her delivery men were robbed. She herself was brutally attacked and robbed. She required medical attention. Again she was attacked but was able to escape without serious injury. At that point she fled Guatemala and sought Canada's protection.

[5] The Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada dismissed her claim on two grounds. Although she was believed, and that there was an objective basis for her fear that she would be persecuted on return to Guatemala, and subjected to a risk of cruel and unusual treatment or punishment, she was not a refugee within the meaning of the United Nations Convention, and not a person who was otherwise in need of Canada's protection.

[6] She could not be considered as a refugee because her well-founded fear of persecution was not on the basis of race, religion, nationality, political opinion or membership in a particular social group, the five grounds for refugee status, which are repeated in section 96 of the *Immigration and Refugee Protection Act* (IRPA). It has been well-established that a victim of criminality, in this case extortion, without more, is not a member of "a particular social group" (*Gudino v Canada (Minister of Citizenship and Immigration)*, 2009 FC 457, [2009] FCJ No 560 (QL) at paras 19-22; *Jean-Baptiste v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1261, [2009]

FCJ No 1590 (QL) at paras 18-20; and *Kang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1128, [2005] FCJ No 1400 (QL) at paras 9-10).

[7] Section 97 of IRPA goes on to provide that a person in Canada is in need of our protection if removal to his or her country of nationality would subject that person "personally" "to a risk to their life or to a risk of cruel and unusual treatment or punishment if… 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."

[8] The RPD determined that Ms. Jimenez Palomo faced a generalized risk rather than a personalized risk, and therefore could not benefit from section 97. It is that part of the decision which is subject to this judicial review.

[9] It is implicit in the RPD's decision that the risk facing Ms. Jimenez Palomo would indeed be faced by her "in every part of the country" as it acknowledged that the gang was present in Guatemala and throughout Latin America.

ISSUE

[10] On the facts of this case, there is only one issue. The decision was a mixed one of fact and law. The issue is whether the decision was reasonable.

DISCUSSION

[11] The distinction between “personal” and “general” risk in section 97 of IRPA is becoming more and more the subject of judicial review. Although examples may be given of what is obviously a random act of violence, which is certainly not personal, and a case where a person is specifically targeted because of who he or she is or his or her special situation, there is a broad spectrum of situations which fall between the two extremes.

[12] A teenaged girl who is shot down by a stray bullet on a Toronto street is a victim of random violence. So too is a young boy walking down a Montreal street when a car bomb explodes. They were not specifically targeted; they were in the wrong place at the wrong time.

[13] On the other hand a dispute may develop with respect to land ownership, which could lead to a “blood feud”. This is very specific, which requires the RPD to consider state protection, and, if appropriate, the internal flight alternative.

[14] The decisions of this Court have to be read with much caution, and in context. For the most part, this Court is called upon to decide whether a decision of the RPD was reasonable. That decision in turn depends on the facts of the particular case, the country conditions before the decision maker and often other elements of the claim, such as credibility, state protection and the internal flight alternative. It must be borne in mind that a decision may be reasonable even if the Court, had it been called upon to make the decision in first instance, would have come to a different conclusion (*Canada (Director of Investigation and Research, Competition Act) v Southam Inc.*,

[1997] 1 SCR 748, [1996] SCJ No 116 (QL) at para 80; and *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[15] Although judges may use rather broad and sweeping language, the basis of the decision may actually turn on whether the judge considered the decision to be reasonable or not. It may well be that 30 judges will not all come to the same conclusion on the same set of facts.

[16] A reading of the case law brings to mind the decision of the House of Lords in *The Thames and Mersey Marine Insurance Company, Limited v. Hamilton, Fraser, & Co.* (1887) 12 APP CAS 484 where Lord Macnaghten said at page 502:

> Your Lordships were asked to draw the line and to give an exact and authoritative definition of the meaning of the expression "perils of the seas" in connection with the general words. For my part I decline to attempt any such task. I do not think it is possible to frame a definition which would include every case proper to be included, and no other. I think that each case must be considered with reference to its own circumstances, and that the circumstances of each case must be looked at in a broad common sense view and not by the light of strained analogies and fanciful resemblances.

[17] With that in mind, I consider the following facts in Ms. Jimenez Palamo's case to be relevant:

a. She was targeted by a well-known group of gangsters, not simply one individual;

b. she was wealthy, or at least moderately so;

c. she was a shopkeeper;

d. she resisted the extortionists;

e. her resistance was spread out over at least a few years;

f. she was assaulted not once, but at least three times, and required medical attention;

g. her family was threatened; and

h. her employees were robbed.

[18] In determining whether an individual is at personal risk, it is not sufficient to simply assess country conditions. Those conditions have to be considered in the light of the individual's personal situation (*Frederic v Canada (Minister of Citizenship and Immigration)*, 2010 FC 220, [2010] FCJ No 253 (QL) at para 21; *Gabriel v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1170, [2009] FCJ No 1545 (QL) at para 23; and *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31, [2009] FCJ No 143 (QL) at para 7).

[19] Although such cases as *Martinez Pineda v Canada (Minister of Citizenship and Immigration)*, 2007 FC 365, [2000] FCJ No 501 (QL) and *Aguilar Zacarias v Canada (Minister of Citizenship and Immigration)*, 2011 FC 62, [2011] FCJ No 144 (QL) appear to assist Ms. Jimenez Palamo, in both cases judicial review was granted because the applicant's personal circumstances were not considered. As Mr. Justice Simon Noël said at paragraph 17 of *Aguilar Zacarias*, above:

> 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. Because the Applicant's credibility was not in question, the Board had the duty to fully analyse and appreciate the personalized risk faced by the Applicant in order to render a complete analysis of the Applicant's claim for asylum under section 97 of the IRPA. …

[20] It is not enough to be wealthy (*Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, [2008] FCJ No 415 (QL), appeal dismissed, 2009 FCA 31, [2009] FCJ

No 143 (QL), or to be a shopkeeper, or a fare collector on a bus (*Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213, [2009] FCJ No 270 (QL)).

[21] As Madam Justice Tremblay-Lamer held in *Prophète*, above, the Court is faced with an individual who may have a personalized risk, but one that is shared by many others. The fact that a specific number of individuals may be targeted more frequently than others does not mean that the risk is not faced generally within the meaning of section 97.

[22] I adopt the following words of Mr. Justice Crampton in *Paz Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182, [2011] FCJ No 222 (QL), where he said at paragraph 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.

[23] Ms. Jimenez Palomo's situation is unlike that in *Munoz v Canada (Minister of Citizenship and Immigration)*, 2010 FC 238, [2010] FCJ No 268 (QL). Mr. Munoz owned a car dealership which had been targeted by a crooked policeman who was also a member of a large criminal gang.

Not only was there extortion, but the policeman also wanted a free car. Mr. Justice Lemieux said at paragraph 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.

[24] Nor is this case similar to *Dieujuste-Phanor v Canada (Minister of Citizenship)*, 2011 FC 186, [2011] FCJ No 226 (QL), one of the many cases in which judicial review was granted because the RPD did not fulfill its duty to analyze and appreciate the personal risk face by the applicants. As stated by Mr. Justice Kellen at paragraph 26:

> … In the case of the applicants, reprisal was sought because the principal applicant, a nurse, had not admitted a patient who later died and the kidnappers sought revenge. Then when the principal applicant reported the kidnapping to the police, the kidnappers again sought revenge.…

[25] The risk to Ms. Jimenez Palomo was, in my opinion, general as it was a risk facing shopkeepers at large in Guatemala. Her refusal to pay extortion money and the assaults upon her did not take her out of that category. As Mr. Justice Crampton held in *Baires Sanchez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 993, [2011] FCJ No 1358 (QL), at paragraph 23:

> … it was reasonably open to the Board to conclude, based on its findings that violence at the hands of the Maras Salvatrucha gang is a risk faced widely by people in El Salvador, that the risk faced by Mr. Baires Sanchez is a risk "faced generally by other individuals in or from El Salvador," as contemplated by paragraph 97(1)(b)(ii) of the IRPA. The fact that the particular reason why Mr. Baires Sanchez may face this risk may differ from the particular reason why others face this risk is of no consequence, given that (i) the nature of the risk

> is the same, namely, violence (including murder); and (ii) the basis for the risk is the same, namely, the failure to comply with the MS-13's demands, whether they be to join their organization, to pay extortion money, or otherwise. As the Board appropriately recognized, "[a] generalized risk does not have to affect everyone in the same way."

[26] As the case is fact-specific, the parties did not propose a serious question of general importance for certification and none shall be certified.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that

1. This application for judicial review is dismissed.

2. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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