Federal Court  Cour fédérale

Date: 20120924

Docket: IMM-9305-11

Citation: 2012 FC 1114

Ottawa, Ontario, September 24, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

JOSE WALTER ESCAMILLA MARROQUIN, PATRICIA LISSETTE MURILLO GALVEZ DE ESCAMILLA, WALTER EDUARDO ESCAMILLA MURILLO, ANNGIE STEPHANIE ESCAMILLA MURILLO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated November 17, 2011, finding that the applicants were not Convention refugees nor persons in need of protection pursuant to sections 96

and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). For the reasons that follow the application is granted.

Facts

[2] The applicants are a family from El Salvador: Jose Walter Escamilla Marroquin (applicant); his wife, Patricia Lissette Murillo Galvez de Escamilla (female applicant); and their children, Anngie Stephanie Escamilla Murillo and Walter Eduardo Escamilla Murillo (minor applicants).

[3] The applicant worked as a long-haul truck driver. In October 2005, he returned from a trip and parked his trailer unit on the street near his home. The next morning he discovered it had been stolen. He was approached by members of the Mara 13 gang who saw him looking for his truck. They told him they were in control of the neighbourhood and not to go to the police or he would be killed.

[4] The applicant called his boss and informed him of the theft. His boss told him to file a police report for insurance purposes otherwise he would be financially responsible for the loss of the unit. The applicant filed a police report and the boss drove the police to the scene of the theft. The applicant states that the Mara 13 gang members are always in the area and surely saw the police at the scene of the theft.

[5] The applicants hid in their home for about a week, fearing the gang members. The applicant states that he felt they were being watched. After a week, they moved to his mother's house and then decided to flee El Salvador. The female applicant traveled to the United States using a visitor's visa in November 2005. The other applicants traveled to the United States illegally in December

2005 and were detained by border patrol. They were told to report at an immigration hearing, which was held in July 2009, at which point the applicants were ordered to leave the country within eight months. The applicants arrived in Canada on February 12, 2010, and claimed refugee protection the same day.

Decision Under Review

[6] The Board found the applicant and female applicant to be credible in their testimony, and thus accepted their allegations as true. The Board noted that the applicants had conceded that their claims did not fall within the scope of section 96. The Board agreed with this and thus proceeded to assess the claims solely under section 97 of the *IRPA*.

[7] Under section 97, the Board found that the determinative issue was whether the risk was generalized. The Board noted that theft and extortion are common problems in El Salvador. The Board noted that it had asked the applicant why his situation was different than any other victim of crime and noted the applicant's response that his life was threatened by the Mara 13, and that gang carries through with its threats. The Board also noted the submission of counsel for the applicants that the applicant was being specifically targeted by the gang. The Board held at paragraph 44:

> Canadian case law, including decisions in *Acosta, Ventura De Parada* and *Perez*, all involving circumstances in which claimants feared extortion, violence and threats from criminal gangs, held that personal risk felt by claimants where the violence was prevalent in a variety of sectors of the country was not different from the generalized risk in that country.

[8] The Board then quoted extensively from the Court's decision in *Paz Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182, relying on that case for the proposition

that a risk may still be generalized even if a claimant is part of a subgroup targeted more frequently in a country. The Board found: "I cannot agree that simply because his life was threatened that he is different than any other victim of crime in El Salvador." The applicant's claim was therefore refused.

[9] The Board similarly found that the armed robbery of the female applicant was a random incident of violent crime and there was no evidence she was targeted. She had therefore not established a risk that was not faced generally by other individuals in El Salvador. The remainder of the female applicant's allegations were the same as the applicant (as were the minor applicants'), and therefore their claims were also refused.

Standard of Review and Issue

[10] The issue raised by this application is whether the Board's finding that the applicants faced a generalized risk was reasonable: *Dunsmuir v New Brunswick*, 2008 SCC 9.

Analysis

[11] I find that the Board's analysis of whether the applicants faced a generalized risk was unreasonable and the decision must be set aside. As this Court has consistently held: *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678; *Vaquerano Lovato v Canada (Citizenship and Immigration)*, 2012 FC 143; *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210, *Alvarez Castaneda v Canada (Minister of Citizenship and Immigration)*, 2011 FC 724, *Barrios Pineda v Canada (Minister of Citizenship and Immigration)*, 2011 FC 403, and *Aguilar Zacarias v Canada (Minister of Citizenship and Immigration)*, 2011 FC 62, that the mere

fact that the persecutory conduct is also criminal conduct which may also be prevalent in a country does not end the analysis of a claim under section 97. The Board must consider whether the applicants faced a risk that was different in degree than that faced by other individuals in El Salvador.

[12] The applicants' testimony was found credible, and thus all the allegations were accepted. The Board therefore accepted that the applicant reported the theft of his truck to the police, that the Mara 13 became aware of this fact, and that the applicants fled El Salvador because they feared retaliation by the gang. This is the precise kind of factual scenario which may go beyond a generalized risk, as in the cases listed above.

[13] The Board focused on the fact that theft is a common problem in El Salvador, but as the applicants submit, it was not the theft itself that gave rise to their risk. Rather, the applicant was at risk because he reported the theft to the police and therefore became a target of the Mara 13. The decision will be set aside, therefore, for failing to assess the claim in accordance with the applicable legal principle.

[14] There is a second basis for setting the decision aside. It arises from the failure of the Board to consider highly relevant evidence. The evidence before the Board was that another man named Walter Escamilla, who also worked at the applicant's trucking company, was executed on January 18, 2011, because he was confused with the applicant.

[15] The failure to address material evidence renders the decision unreasonable. I would add, however, that this is also evidence which ought to have been considered as part of the section 97 analysis, had it been properly framed. This was evidence that in fact the applicant faces a very different risk than the average El Salvadoran and faces specific targeting by the gang.

[16] The respondent argues that the Board is entitled to deference, as it is for the Board and not the Court to determine whether a risk is general based on the facts. The respondent also submits that the cases relied on by the applicant involved much stronger evidence of risk, with the claimants often being subjected to continuous threats over a period of time.

[17] The respondent's argument cannot succeed because the Board did not reach its conclusion based on the strength of the evidence; rather, the Board accepted the applicants' evidence as credible, and furthermore accepted that the applicant had been targeted and would be targeted in the future. The Board's decision was therefore not based on the weighing of the evidence, but rather on the mistaken premise that the applicant faced a generalized risk even if he was specifically targeted in a way that others in El Salvador are clearly not. The Board's decision was inconsistent with the law and rendered unreasonable by reason of the failure to consider material evidence, and the application must be granted.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The matter is referred back to the Immigration Refugee Board for reconsideration before a different member of the Board's Refugee Protection Division. No question for certification has been proposed and the Court finds that none arises.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9305-11
STYLE OF CAUSE:	**JOSE WALTER ESCAMILLA MARROQUIN, PATRICIA LISSETTE MURILLO GALVEZ DE ESCAMILLA, WALTER EDUARDO ESCAMILLA MURILLO, ANNGIE STEPHANIE ESCAMILLA MURILLO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Saskatoon, Saskatchewan
DATE OF HEARING:	August 22, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	RENNIE J.
DATED:	September 24, 2012

APPEARANCES:

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