Federal Court Cour fédérale

Date: 20130408

Docket: IMM-2806-12

Citation: 2013 FC 344

Ottawa, Ontario, April 8, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

GIOVANNI ORTEGA ARENAS
ARACELI SONI ORTEGA
ANDREA ORTEGA SONI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review in respect of the decision of the Refugee Protection Division of the Immigration and Refugee Board [the RPD or the Board], dated March 7, 2011, finding the applicants to be neither Convention refugees nor persons in need of protection.

[2] The applicants are a father, mother and daughter from Veracruz, Mexico. Their claim is based on the father's experiences with members of the Zetas drug cartel. The father [the principal

applicant] was a successful businessman, who operated two stores in Veracruz. In February 2009, he began receiving threats (first by phone, then in person) in which he was told that if he did not pay a significant sum to the cartel, his daughter would be kidnapped. After several phone calls, the applicant reported the situation to the local police. Two days later, the cartel members came to the applicant's store, put a gun to his head, and assaulted his wife. They demanded an increased sum of money and told the applicant that they had learned of his police report from the police, themselves. They also threatened that they would be able to track the applicant and his family down, no matter where they went in Mexico. The next day, the principal applicant and his family fled to Canada and made claims for protection upon arrival.

[3] This is the second time this matter has come before this Court. In a decision dated October 13, 2011, Justice Campbell set aside an earlier decision in the applicants' claims because the RPD had failed to conduct a reasonable state protection analysis. When the matter was remitted to the Board, it premised its decision not on state protection but, rather, on a finding of generalized risk under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA or the Act]. More specifically, the Board characterized the principal applicant's risk as flowing from "a refusal to participate in criminal activities" because the principal applicant refused to act as a drug courier and held that he was "personally targeted but that the risk he faces is the same faced by [the] general population or a large subset of population." The RPD thus held that the principal applicant was disentitled to protection under section 97 of the IRPA. It also determined that a claim under section 96 of the IRPA was not available because there was no nexus to a ground enumerated in the Refugee Convention.

[4] The applicants argue that the Board's decision must be set aside because its section 97 analysis is erroneous in two respects: first, the RPD mischaracterized the nature of the risk claimed by the principal applicant, who had never been targeted as a potential drug courier, and, second, the RPD provided an erroneous interpretation of section 97 of the IRPA in holding that the personal targeting faced by the principal applicant was a generalized risk.

[5] The respondent, on the other hand, argues that the Board's characterization of the principal applicant's risk is immaterial as the decision elsewhere reveals that the Board correctly understood what had occurred and that the interpretation given by the Board to section 97 of the IRPA was both reasonable and correct. The respondent asserts in this regard that the wording of section 97 contemplates that a risk can both be personal and also be faced by a large segment of the population and that, where this occurs, protection is not available under section 97 of the IRPA. The respondent thus argues that the statements made in *Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678 [*Portillo*]; *Tomlinson v Canada (Minister of Citizenship & Immigration)*, 2012 FC 822 and *Olvera v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1048 [*Olvera*] regarding the incompatibility of finding a personalized risk to be general are incorrect. The respondent additionally relies on *Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 11 and *Osorio v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1459 in support of the argument that it matters not whether the degree of risk faced by the claimant is the same as is faced by others in the country, but rather, that what matters is the cause of the claimed risk. More specifically, the respondent argues that where, as here, extortion led to the circumstances the applicants fear, the risk is a general one because many Mexicans face the risk of extortion.

[6] With respect, I disagree with the arguments advanced by the respondent, and, for the reasons set out below, have determined that the Board's decision must be set aside.

Standard of review

[7] Turning, first, to the standard of review, the first error alleged by the applicants – the Board's mis-assessment of the principal applicant's profile – is factual and thus to be reviewed on the reasonableness standard (see e.g. *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51; *Garcia Arias v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1029 at para 12). Insofar as concerns the second alleged error, a convincing case can be made in support of the application of the correctness standard of review to the Board's interpretation of section 97 of the IRPA. This issue is arguably of general importance to the legal system as a whole because section 97 imports Canada's international treaty obligations into domestic law (see *Portillo* at para 26; *Canada (Minister of Citizenship and Immigration) v B472*, 2013 FC 151 at para 22). However, as in *Portillo*, because I find the Board's interpretation of section 97 to be both unreasonable and incorrect, nothing turns on the selection of the standard of review.

Mischaracterization of the principal applicant's risk

[8] Prior to discussing the Board's interpretation of section 97 of the IRPA, it is useful to reproduce the section. It provides:

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	**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

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

(*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 themself 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.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

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) 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.

Note marginale :Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes

auxquelles est reconnu par règlement le besoin de protection.

[9] As I held in *Portillo*, section 97 of the IRPA mandates the following inquiry. First, the RPD must correctly characterize the nature of the risk faced by the claimant. This requires the Board to consider whether there is an ongoing future risk, and if so, whether the risk is one of cruel or unusual treatment or punishment. Most importantly, the Board must determine what precisely the risk is. Once this is done, the RPD must next compare the risk faced by the claimant to that faced by a significant group in the country to determine whether the risks are of the same nature and degree.

[10] Here, the Board held that the principal applicant was at risk because he refused to participate in criminal activities, namely couriering drugs. However, nothing of the sort occurred. It is difficult to understand why the Board said it did, other than by surmising that the panel member must have copied his reasons from another case without taking care to edit them. What actually happened is that the principal applicant refused to pay monies that the Zetas tried to extort, reported the matter to the police and then, along with his family, was threatened.

[11] Contrary to the respondent's assertion, the RPD's mischaracterization of the risk faced by the principal applicant is not a simple clerical error, but, rather, is central to the Board's analysis. The Board three times mis-described the nature of the risk in the context of explaining why it believed the risk was a generalized one (decision at paragraphs 16, 17 and 27). This error in large part led the Board to conclude that similar risks were faced by others in Mexico. What it ought to have done was determine whether, in light of what had actually happened to the principal

applicant, he and his family were more likely than not to face a risk to life or of cruel and unusual treatment or punishment or be subjected to torture.

[12] As noted in *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210 [*Guerrero*] by Justice Zinn, and as I noted in *Portillo*, accurately describing the nature of the risk faced by a refugee claimant is an essential first step in the section 97 analysis. If the risk is mischaracterized, the RPD will typically make a reviewable error. That is precisely what occurred here: the mischaracterization of the nature of the principal applicant's risk led the Board to err in its application of section 97. This mischaracterization provides sufficient basis to set aside this decision.

<u>Misinterpretation of section 97 of the IRPA</u>

[13] After making this first error, the Board then also erred in the second step of its section 97 analysis by comparing the applicants' situation to that of other well-to-do Mexican citizens. Its erroneous interpretation of section 97 of the IRPA is entirely intertwined with its mischaracterization of the applicants' risk.

[14] The focus of the second step in the inquiry is to compare the nature and degree of the risk faced by the claimant to that faced by all or a significant part of the population in the country to determine if they are the same. This is a forward-looking inquiry and is concerned not so much with the cause of the risk but rather with the likelihood of what will happen to the claimant in the future as compared to all or a significant segment of the general population. It is in this sense that in *Portillo* I held that one cannot term a "personalized" risk of death "general" because the entire

country is not personally targeted for death or torture in any of these cases. There is in this regard a fundamental difference between being targeted for death and the risk of perhaps being potentially so targeted at some point in the future. Justice Shore provides a useful analogy to explain this difference in *Olvera*, where he wrote at para 41, "The risks of those standing in the same vicinity as the gunman cannot be considered the same as the risks of those standing directly in front of him".

[15] Contrary to applying the foregoing analysis, the Board held that drug-related crime is rampant in Mexico and that even though the principal applicant had been "personally targeted," the risk he faced was the same as that faced by a large subset of the population due to the prevalence of crime in the country. As I held in *Portillo*, this conflation of actual risk faced by the applicants with potential risk faced by all others in Mexico is both an incorrect and unreasonable interpretation of section 97 of the Act.

[16] For these reasons, this decision must be set aside.

Certified question

[17] The applicants requested that I certify the following question that Justice Zinn refused to certify in *Guerrero*, namely:

> Can a risk which was initially random, indiscriminate, or general, be personalized through subsequent action of either the persecutor or the victim, such as where there is an escalating or targeted reprisal for refusal to pay?

[18] The respondent resists certification of this question, arguing that the Federal Court of Appeal declined to answer such a general question in *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31. The respondent also argues that, by its nature, the requisite inquiry in a section 97 case must be fact-specific and, therefore, that certification of a question in a case like the present is inappropriate.

[19] I agree that the question posed by the applicants is too general to warrant certification. Nor do I believe it is appropriate in this case to certify a different, more narrowly-worded question aimed at seeking a confirmation from the Court of Appeal as to the correct approach to interpreting section 97 because the Board's erroneous interpretation of the section in this case is completely tied to its mischaracterization of the applicants' risk, which is specific to their circumstances. This, however, should not be taken as meaning that no question should ever be certified regarding the meaning to be ascribed to section 97 of the IRPA. In an appropriate case, certification may well be warranted if there remains a tension in the jurisprudence regarding how this section is to be interpreted.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review of the RPD's decision is granted;
2. The RPD's decision is set aside;
3. The applicants' refugee claim is remitted to the RPD for re-determination by a differently constituted panel of the Board;
4. No question of general importance is certified; and
5. There is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2806-12
STYLE OF CAUSE:	*Giovanni Ortega Arenas et al v The Minister of Citizenship and Immigration*
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT AND JUDGMENT:	GLEASON J.
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