

Federal Court



Cour fédérale

Date: 20130425

Docket: IMM-7973-12

Citation: 2013 FC 426

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 25, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

**WILMAR BURGOS GONZALEZ
MONICA ROCIO BALLESTEROS CLAROS
JERONIMO BURGOS BALLESTEROS
JUAN JACOBO BURGOS BALLESTEROS**

Applicants

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated July 11, 2012. The RPD rejected the claim for refugee protection by Mr. Burgos Gonzalez (Mr. Gonzalez), his wife and his two children (collectively referred to as the applicants), because it found that the applicants were not persons in

need of protection pursuant to paragraphs 97(1)(a) and (b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

II. The facts

[2] The applicants are citizens of Colombia. Mr. Gonzalez is a well-known businessman. Since 2002, he has been the co-owner of a business specializing in the sales and distribution of construction materials, which is valued at a thousand million Colombian pesos (a little over C\$550,000.00).

[3] Mr. Gonzalez alleges that starting in February 2010, he received several anonymous telephone calls threatening him and demanding payment of two hundred and fifty million pesos (about C\$130,000.00). The extortion demands continued throughout March and April 2010. When Mr. Gonzalez tried to report the extortion to the police, he was told that there had to be evidence to file a complaint. Thus, he decided to record the subsequent telephone calls and submit the audio tapes to the Office of the Attorney General of the nation.

[4] A few days later, when he was leaving his house, Mr. Gonzalez sensed that he was being followed by individuals on motorcycles. They apparently disappeared when he was trying to contact the nearest police station.

[5] Mr. Gonzalez and his family received many more telephone threats of extortion following this incident. The technical investigation team of the extortion and terrorism office, however, refused to accept Mr. Gonzalez' telephone recordings as it deemed them superficial. Mr. Gonzalez

also reported these incidents to the Fiscalía and while this complaint was still under investigation, the applicants left Colombia on September 26, 2010, to go to the United States. They arrived in Canada on October 3, 2010, where they claimed refugee protection.

[6] The RPD found the testimony of Mr. Gonzalez and his wife to be credible and trustworthy.

[7] The RPD noted that, according to his oral testimony, Mr. Gonzalez decided to leave his country when he noticed that he was starting to be followed by individuals on motorcycles because, according to him, the majority of murders are carried out by people who threaten their victim by chasing them on motorcycle. Moreover, in late April 2010, Mr. Gonzalez was warned by his persecutors that they would be putting a bomb in his home to kill him.

[8] The RPD was not convinced that these events could be considered a personal risk to the applicants. The RPD determined rather that, based on the evidence as a whole, the applicants faced extortion that, according to the documentary evidence, is frequent and generalized across the country, especially since the people who contacted Mr. Gonzalez were not identified. The RPD acknowledged that Mr. Gonzalez is a wealthy businessman and as a result he would attract envy, but it found that his problems were because of generalized violence occurring with extortion. According to the RPD, most wealthy people or those who are perceived to be wealthy, are targets of extortion or kidnapped and the Colombian government is unable to provide perfect protection to the entire country despite its best efforts.

[9] Last, the RPD noted that the applicants did not exhaust their recourse to the Colombian authorities by addressing higher echelons, and that according to the report on their complaint, dated September 9, 2010, their complaint is still active and the case is under investigation. The RPD also noted that given the fear and danger felt and experienced by the applicants, it was reasonable to expect that they would seek protection from the first country that is a signatory to the Geneva Convention in which they found themselves, specifically the United States.

[10] Despite these additional points raised by the RPD, it should be noted that the rejection of the applicants' refugee protection claim was primarily based on the RPD's findings regarding the generalized nature of their risk as wealthy people who might be targeted by criminal gangs for extortion and scams. It is also this finding that the applicants are challenging. They claim that the RPD erred, first in their assessment of the claim based on section 97 of the IRPA by failing to carry out a distinct analysis of the applicants' situation and then in their assessment of the risk, which the applicants consider personalized, that the applicants would face if they returned to their country.

III. Standard of review

[11] The review of a claim made under subsection 97(1) of the IRPA calls for an individualized and essentially factual inquiry. The appropriate standard of review is thus reasonableness. In other words, "failure [of the RPD] to consider the claim as it is put forward by [the applicants] constitutes a misapprehension of the facts and the evidence" (*Turton v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1244 at paragraphs 27-28 (*Turton*)). Moreover, assessment of the generalized or personalized nature of the alleged risks involves applying the IRPA to a specific factual situation, and the RPD's findings are reviewable against a standard of reasonableness *Perez*

v Canada (Citizenship and Immigration), 2009 FC 1029 at paragraph 24 (*Perez*).

IV Analysis

[12] The case law has acknowledged that even if the risk has a generalized basis, it can become personalized through the specific circumstances raised in each refugee protection claim. If the applicant's account is deemed credible, as is the case here, the RPD cannot rely only on the generalized nature of the threats as it sees them; it has the duty to conduct an individualized and thorough analysis of the facts presented, examining all the aspects of risk stemming from these facts, to determine whether the risk has become personalized even if the applicant was initially a random target (*Pineda v Canada (Minister of Citizenship and Immigration)*, 2007 FC 365 (*Pineda*); *Zacarias v Canada (Minister of Citizenship and Immigration)*, 2011 FC 62 at paragraphs 15-17).

[13] This is the case when a refugee protection claimant is believed to be responsible for the death of a gang member and risks retaliation (*Turton*, above, at paragraph 100); when a claimant is specifically and individually targeted and threatened by gang members who suspect him of providing information to the police after treating a gang member (*Pineda v Canada (Minister of Citizenship and Immigration)*, 2011 FC 403 at paragraphs 12-13); or when a criminal gang has been hired to kill a claimant who refused to carry drugs across the border (*Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210 at paragraphs 22-23 (*Guerrero*)).

[14] The RPD must answer the following question: whether in the context of the alleged present or prospective risks, the applicants provided evidence of their specific circumstances that would make their risk distinct from that of the general population given the widespread presence of gangs

in their country. If the applicants do not succeed in showing that their risk, although generalized, had become personal or personalized, it is open to the panel to dismiss their application. Several decisions of this Court have emphasized that without such an individualized analysis, the protection of subsection 97(1) would be stripped of its content or meaning every time that, in a specific country, there is a danger that could be described as generalized. I would refer specifically to the comments of Justice Zinn of this Court in *Guerrero*, above, at paragraphs 32-34, where he writes the following:

The fact that decisions of this Court and the Court of Appeal have long held that such an individualized inquiry is required explains, in part, why I do not accept the submission of the respondent regarding *Baires Sanchez*. The respondent relied on this decision to support his submission that virtually any risk of violence at the hands of a criminal gang in one of the Central or South American countries where gang violence is prevalent is a risk generally faced by citizens of the country and thus falls outside the protection offered by s. 97 of the Act. To accept that bold proposition would run counter not only to the position expressed by our Court of Appeal, it would also run counter to those cases where this Court has found a personal risk from such gangs that is not also a general risk: See, for example *Pineda v Canada (Minister of Citizenship and Immigration)*, 2007 FC 365; *Zacarias v Canada (Minister of Citizenship and Immigration)*, 2011 FC 62; *Barrios Pineda v Canada (Minister of Citizenship & Immigration)*, 2011 FC 403; and *Alvarez Castaneda v Canada (Minister of Citizenship and Immigration)*, 2011 FC 724.

During the course of oral submissions, I asked the respondent, given his interpretation of *Baires Sanchez*, if he could provide an example of a situation where a person targeted for death from a gang in one of these gang-infested countries could obtain s. 97 protection. The example provided in response was the situation where a gang had been hired to kill a claimant. In that circumstance, it was submitted that the risk to the claimant was personal and was not one faced generally by the population. I note that the scenario provided is exactly that which this applicant faced. He faced death at the hand of a gang hired by a criminal organization to kill him.

I do not accept that protection under the Act is limited in the manner submitted by the respondent. This is not to say that persons who face the same or even a heightened risk as others face of random or indiscriminate violence from gangs are eligible for protection. However, where a person is specifically and personally targeted for death by a gang in circumstances where others are generally not, then he or she is entitled to protection under s. 97 of the Act if the other statutory requirements are met.

[15] All the parties relied on cases that could seem contradictory with respect to the scope of subparagraph 97(1)(b)(ii) of the IRPA, specifically under what circumstances could a person claiming a risk of being killed by a criminal gang in one of the countries where gang violence is prevalent is a risk “not faced generally by other individuals in or from that country.” It is clear that the issue of being targeted depends largely on the specific facts of the case, thus the RPD should be given some deference. Having read the case law raised by the parties, I fully agree with the opinion of Justice Rennie in *Vivero v Canada (Minister of Citizenship and Immigration)*, 2012 FC 138 at paragraph 11, where he states that differences in the outcomes of section 97 cases stem from the need for an individualized inquiry by the RPD in each case.

[16] In this case, it cannot be claimed that the RPD based its decision solely on the finding that the risk faced by the claimants stemmed from criminal activity that is widespread in Colombia (unlike in *Lovato v Canada (Minister of Citizenship and Immigration)*, 2012 FC 143 at paragraph 14 and *Beltran (By his Litigation Guardian) v Canada (Minister of Citizenship and Immigration)*, 2012 FC 275 at paragraph 18). In this case, although in its brief reasons for decision, the RPD did not specifically state its finding regarding the applicants’ lack of personalized risk; it noted all of the facts alleged in support of their application (including the numerous extortion demands and threats that Mr. Gonzalez received and the fact that he was followed once by individuals on

motorcycles), and then considered whether other wealthy people in the country would generally face this risk. Moreover, the RPD noted that Mr. Gonzalez did not know the identity of the two individuals who had threatened him by telephone or those who were following him. On the whole, unlike the decisions mentioned at paragraph 13 above, nothing in the evidence indicates to me that the RPD should have determined that the prospective risk that the applicants would face, if they were to return to their country, would differ from the risk facing all wealthy citizens. In other words, the simple fact that the risk materialized in the past, in a relatively random manner, does not make it a prospective personalized risk.

[17] Essentially, our case law indicates that the alleged risk may be personalized either because of its targeted or unusual nature (as opposed to a random and systematic risk) or because of its extent. In *Perez*, above, at paragraph 34, the Court mentioned that the repetitive nature of the threats against the applicants was a continuation of the extortion and the generalized risk of violence that all citizens of the country face. Similarly in *Pineda*, above, at paragraphs 12-15, the Court determined that the continual threats and assaults against the applicant over an extended period of time should have been considered by the RPD before it determined that the applicant was not subjected to a risk greater than the risk faced generally by the population at large (see also *Ventura v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1107, at paragraph 19). In *Perez*, above, at paragraph 34, Justice Kelen distinguished *Pineda* by stating that unlike in that case, “[t]here is no evidence that the *maras* personally targeted the applicants or that they face a greater risk than other small business owners or persons perceived to be relatively wealthy”.

[18] In this case, the RPD took into consideration the fact that there were multiple extortion demands that sometimes included death threats. However, it was reasonable to find that these facts were not enough to place the applicants outside the generalized risk of violence and to demonstrate that, on the balance of probabilities, Mr. Gonzalez had been targeted by a gang or likely would be in the future. The applicants did not raise any fact other than those that were noted by the RPD and have not satisfied me of how, or at what point, their risk became personalized. Given the absence of such facts, I can only find that the RPD's finding does not fall "within the range of possible, acceptable outcomes which are defensible in respect of facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 190 at paragraph 47).

V. Conclusion

[19] Consequently, I find that the RPD's other findings, regarding State protection and the applicants' lack of subjective fear, were only subsidiary, and even if they were erroneous, they would be insufficient overall to set aside the impugned decision.

[20] For these reasons, this application for judicial review will be dismissed. The parties did not suggest questions for certification and none arise in this case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

- a. The application for judicial review is dismissed; and
- b. No question is certified.

“Jocelyne Gagné”

Judge

Certified true translation
Monica F. Chamberlain

FEDERAL COURT
SOLICITORS OF RECORD

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