Federal Court  Cour fédérale

**Date: 20110621**

**Docket: IMM-4652-10**

**Citation: 2011 FC 733**

**Ottawa, Ontario, June 21, 2011**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**ELIAS GIOVANI IPINA IPINA**
**DANIEL DE JESUS IPINA IPINA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are brothers and citizens of Guatemala. They base their claim for protection on persecution from the Mara 18 gang. The applicants worked at their father's farm until their father received phone calls from the *maras* demanding money and threatening to kill the applicants. The father received a total of three phone calls but refused to pay. On one occasion, the applicants were approached by four men with guns. The father went to the police once and the police told him they

would investigate the calls. The applicants left Guatemala further to their father's instruction on March 26, 2008. They claimed refugee status in Canada in April 2008. The rest of the family moved to another part of the country where they are safer and have not been harmed.

[2] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA") of the decision made on July 23, 2010 by the Refugee Protection Division of the Immigration and Refugee Board wherein the applicants were determined not to be Convention refugees or persons in need of protection.

[3] The Board found that the applicants failed to rebut the presumption of state protection as they did not provide clear and convincing evidence that state protection in Guatemala is inadequate. In looking at the country conditions, the Board recognized some of the outstanding socio-political issues in Guatemala but also noted the government's efforts to rectify corruption and increase efforts to control gang violence. The Board found that the applicants should have themselves made attempts to seek state protection and not relied exclusively on their father. It also held that there was no nexus to a Convention ground pursuant to s.96 of the IRPA and that the applicants' fear of persecution was based on general criminality and thus came within subparagraph 97(1)(b)(ii) of the IRPA.

**ISSUES:**

[4] The issues on this application are:

1. Did the Board reasonably conclude that the applicants failed to rebut the presumption of state protection?

2. Did the Board err in finding that the risk they faced was generalized?

**ANALYSIS:**

*Standard of Review*

[5] Issues involving state protection are questions of mixed fact and law: *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 61 Admin. L.R. (4th) 313 at para. 38. The reasonableness standard thus applies: *Mamoon v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 794 at para. 7.

*Did the Board reasonably conclude that the applicants failed to rebut the presumption of state protection?*

[6] The Board's finding that there is no nexus to a Convention ground is not challenged. The claim relates exclusively to the risk from crime in the applicants' country.

[7] The applicants submit that the Board in this case failed to conduct an adequate state protection analysis in not specifically assessing the nature, power and sources of influence of the persecuting agent, the Mara 18, and whether state protection against the gang would be "reasonably forthcoming". To this end, the applicants say the Board should have engaged the evidence directly on point, such as the 2010 Human Rights Watch Report for Guatemala.

[8] The applicants also argue that because the threats were made to the father and to the applicants as a result of the father's unwillingness to pay extortion monies, it was irrelevant who presented themselves at the police station in order to make the complaint.

[9] The respondent's position is that there is no evidence of a complete breakdown of the state apparatus in Guatemala. The applicants had not themselves pursued state protection at any level or with any authority and had not taken all reasonable steps in the circumstances to seek protection. They made no effort to approach the police after they were threatened. They waited until their father received threatening calls and went to the police. The police told their father they would investigate. The applicants did not take advantage of the protection available and fled before the police had an adequate opportunity to investigate.

[10] Claimants bear the burden of demonstrating, on a balance of probabilities, and based on relevant, reliable and convincing evidence, that their home country provides inadequate state protection: *Sosa v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 275 at para. 23; *Minister of Citizenship and Immigration v. Carrillo*, 2008 FCA 94, 69 Imm. L.R. (3d) 309 at para. 20.

[11] Here, the Board noted the documentary evidence respecting Guatemala's efforts to deal with gang violence. The Board acknowledged the issues of criminality, corruption and inadequacies in the police and judicial sectors. But, the Board also noted that there were advances in the implementation of measures in Guatemala to deal with such issues, such as the dismissal of corrupt police and corrections officials. The Board pointed to the National Civilian Police (PNC) and their work with the military to combat crime. Investigations regarding misconduct by police are ongoing,

the PNC has trained over 3000 cadets on human rights and in high crime areas, the government operates three, 24-hour court pilot projects which focus on increasing the prosecution rate in these vicinities.

[12] I don't agree with the applicants' submission that these efforts are immaterial. The Board was entitled to take them into account in considering whether Guatemala is in effective control of its territory and has a functioning security force in place to uphold the laws and constitution of the country. As Guatemala is not a state where there was a complete breakdown, the applicants had an obligation to test the effectiveness of the protection before doubting its existence: *Ramirez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1214 at para. 28.

[13] In this case, the Board held that the applicants did not take all reasonable steps in the circumstances in order to seek state protection as it was their father who made the one and only police report. The applicant brothers are adults. It was reasonable for the Board to find that they had not exercised all of their options for state protection by relying exclusively on their father to seek protection on their behalf.

[14] The applicants rely on *Torres v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 234 at paragraph 29, citing *Mendoza v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 119, 88 Imm. L.R. (3d) 81 at paragraph 33, for the proposition that an adequate state protection analysis is one that examines the specific characteristics of the persecuting agent in order to determine if state protection is reasonably forthcoming:

> Where a tribunal determines the applicant has failed to take steps to seek protection this finding is only fatal to the claim if the tribunal also finds that protection would have been reasonably forthcoming. A determination of reasonably forthcoming requires that the tribunal examine the unique characteristics of power and influence

> of the alleged persecutor on the capability and willingness of the state to protect. [Emphasis in original]

[15] In the case at bar, the Board noted that:

> In this case, the principal claimant indicates that the Mara 18 has tried to extort money from the principal claimant's father, threatening death to the principal applicant and the second claimant. The Mara 18 is one of several powerful gangs that have become a national threat to Central American Countries. Guatemala currently registers 100 homicides per 100, 000 people and many are believed to be associated to street gangs.

[16] The Board considered current responses by Guatemala to control street gangs, citing government responses like the National Policy on Prevention of Youth Violence and civil responses in the form of non-governmental organizations like CEIBA (Services for at-risk youth). This demonstrates that the Board had an understanding and an appreciation of the nature of the Mara 18. It also points to the state's willingness to protect, as discussed in *Mendoza above*. While the Board may have mistakenly examined the persecuting agent under the section of its analysis on *Generalized Risk* rather than its discussion under *State Protection*, it is clear, upon reading the decision as a whole, that the Board was aware of these issues, had properly reviewed the documentary evidence and had come to the conclusion that state protection was available in light of the totality of the evidence. See: *Montemayor Romero v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 977 at para. 22.

*Did the Board err in finding that the risk was generalized?*

[17] The applicants argue that they faced a greater personal risk than the population at large, as demonstrated by the repeated death threats due to the father's unwillingness to pay extortion

monies. As such, they submit, the Board erred in finding that the applicants did not qualify for protection by virtue of subparagraph 97(1)(b)(ii).

[18] To constitute a risk to their lives or to a risk of cruel and unusual treatment or punishment that would support a claim for protection under subsection 97(1) of the IRPA, the applicants must be personally subjected to risk which is not generally faced by others: *Menendez v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 221, 14 Admin L.R. (5th 151) at para. 20. The Board found that the Mara 18 poses danger to all individuals living in Guatemala and that the applicant's situation was not unique to them. The documentary evidence, as alluded to above, indicates that gang violence is a very real problem felt by the population of Guatemala at large. There is nothing in the record to suggest that the applicants were targeted for any particular reason. Thus, their risk was reasonably classified by the Board as being generalized.

[19] The applicants' reliance on *Pineda v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 365, 65 Imm. L.R. (3d) 275 is misplaced. In *Pineda*, the applicant was repeatedly targeted for recruitment to a street gang in El Salvador. This is not the case here. There is nothing in the present matter to suggest that the applicants were treated differently by the Maras 18 than were any other Guatemalans who find themselves exposed to this gang's violence in the country.

[20] No questions were proposed for certification.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4652-10 |
| **STYLE OF CAUSE:** | ELIAS GOVANI IPINA IPINA<br>DANIEL DE JESUS IPINA IPINA<br><br>and<br><br>THE MINISTER OF CITIZENSHIP<br>AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | March 22, 2011 |
| **REASONS FOR JUDGMENT:** | MOSLEY J. |
| **DATED:** | June 21, 2011 |

**APPEARANCES:**

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| Samantha Reynolds | FOR THE RESPONDENT |

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