

Federal Court



Cour fédérale

Date: 20120217

Docket: IMM-5166-11

Citation: 2012 FC 218

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, February 17, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

LUIS FERNANDO ALVAREZ FUENTES

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review submitted in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act), of a decision dated June 20, 2011, by the Refugee Protection Division of the Immigration and Refugee Board (panel) that the applicant is not a refugee or a person in need of protection in accordance with sections 96 and 97 of the Act.

I. Background

A. *Factual background*

[2] The facts alleged by the applicant and as stated by the panel are as follows.

[3] Luis Fernando Alvarez Fuentes (applicant) is a citizen of Guatemala. He is seeking refugee protection in Canada because he says that he fears a risk of extortion and persecution by members of an organized criminal gang.

[4] The applicant was the administrator of a public transit bus cooperative called Flomitax in Guatemala City. The applicant's grandmother was also a member of that cooperative and owned four buses.

[5] In January 2006, the applicant's cousin, a bus driver, was the target of a criminal gang (Mara Salvatrucha) that wanted to extort him. The cousin was killed after refusing and attempting to report the situation to the authorities.

[6] On September 1, 2009, the criminal gang started to extort the applicant. The applicant received anonymous telephone calls ordering him to pay significant amounts of money under threat of death.

[7] In mid-September 2009, the applicant went into hiding in Zacualpa. However, death threats resulting from the applicant's failure to pay the amounts demanded continued to be sent to the capital.

[8] On October 1, 2009, the applicant left Guatemala and arrived in Canada on October 18, 2009. He sought refugee protection on October 20, 2009. On June 6, 2011, his refugee claim was heard by the panel.

[9] On the day of the hearing, the applicant submitted an amendment to his Personal Information Form indicating that, in December 2009, his female cousin's husband was killed by a criminal gang after refusing to cooperate during an extortion attempt. The applicant noted that his other cousins witnessed the murder and subsequently received death threats to keep them from testifying. They fled Guatemala and have also sought refugee protection in Canada.

[10] In summary, the applicant maintains that there were three deaths in his family resulting from their refusal to comply with the demands of organized crime.

B. Impugned decision

[11] The panel stated that the applicant's identity had been established. However, the panel found that the applicant was not a refugee in accordance with section 96 of the Act because he did not provide evidence that he feared persecution based on one of the five (5) Convention grounds. More specifically, the panel stated that the applicant was not persecuted because of his membership in a

particular social group or by reason of his race, religion, nationality or political opinion. The panel rejected the applicant's explanation that he had been targeted because of his family, specifically because he is his grandmother's grandson. Instead, the panel stated that, in light of the evidence in the record, the applicant was targeted by the criminal gang for the purposes of illegal gains and extortion.

[12] Furthermore, the panel noted that the applicant had not submitted evidence that he feared persecution by the police or an agent of the state of Guatemala. Consequently, the panel found that the applicant was not a "person in need of protection" under paragraph 97(1)(a) of the Act.

[13] From the perspective of paragraph 97(1)(b), the panel recognized the pervasive nature of social violence in Guatemala and that criminal gangs target certain professions, such as bus drivers and merchants. In this case, the panel found that the applicant had been targeted, but not for his family ties. The panel explained that the applicant's situation was different from that of his cousins who were killed: they had tried to get to the bottom of the attacks and to report the complicity of the police in those matters. In light of the evidence in the record, the panel stated that the applicant would face a generalized risk, not a personalized risk, if he were to return to Guatemala (subparagraph 97(1)(b)(ii) of the Act).

II. Issue

[14] In this application for judicial review, the Court is of the opinion that the issue is as follows:

Did the panel err by finding that the applicant would face a generalized risk if he were to return to Guatemala and thus that he is not a “person in need of protection” in accordance with section 97 of the Act?

III. Applicable legislative provisions

[15] Sections 96 and 97 of the Act read as follows:

REFUGEE PROTECTION,
CONVENTION REFUGEES AND
PERSONS IN NEED OF
PROTECTION

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is

NOTIONS D'ASILE, DE RÉFUGIÉ
ET DE PERSONNE À PROTÉGER

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention – le réfugié – la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni,

unable or, by reason of that fear, unwilling to return to that country.	du fait de cette crainte, ne veut y retourner.
Person in need of protection	Personne à protéger
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 subject them personally	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 habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	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) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(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,	(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(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) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(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.

(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.

IV. Applicable standard of review

[16] It is well established that the application of sections 96 and 97 of the Act to the specific case of a refugee claimant is a question of mixed fact and law that attracts reasonableness (*Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213, [2009] FCJ No 270 at paragraphs 10 and 11; *Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182, [2011] FCJ No 222) at paragraphs 12 to 18.

V. Arguments

[17] The applicant submits that his family was specifically targeted by members of the criminal gang and that the incidents were in no way random. The applicant explains that all of the victims in his family had a connection to the bus company.

[18] Furthermore, the applicant states that the panel mischaracterized the subgroup in question – merchants or bus drivers – in its decision. Instead, the applicant maintains that the subgroup to which he belongs is his family. Furthermore, the applicant argues that the panel made insufficient reference to the documentary evidence describing the intensity of the risk merchants or bus drivers face in Guatemala.

[19] The respondent argues that, in light of the case law and the evidence in the record, the panel’s decision is reasonable: the applicant is not a “person in need of protection” under section 97 of the Act because he would face a generalized risk if he were to return to Guatemala. Also, the respondent notes that the applicant is again attempting to provide the same arguments and explanations that the panel has already rejected.

VI. Analysis

[20] In this case, the determinative issue is generalized risk. On the basis of the facts in this case, the Court finds that the panel’s finding was reasonable.

[21] The Court recalls that claims based on subsection 97(1) of the Act must demonstrate that the applicant would be personally subject to a threat to his life or to a risk of cruel and unusual treatment or punishment and the risk “is not faced generally by other individuals in or from that country.” Pursuant to *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, at paragraph 14, [2008] FCJ No 415 (*Prophète*), a claim based on section 97 of the Act must provide “persuasive evidence (i.e. a balance of probabilities) establishing the facts.”

[22] The case law has established that such a risk must not concern all citizens. As Justice Tremblay-Lamer explained in *Prophète*, the term “generally” was interpreted in a manner that may include segments of the larger population, as well as all residents or citizens of a given country (affirmed by *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 3, [2009] FCJ No 143; see also *Osorio v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1459, [2005] FCJ No 1792). In *Prophète*, Justice Tremblay-Lamer observed the following:

[18] The difficulty in analyzing personalized risk in situations of generalized human rights violations, civil war, and failed states lies in determining the dividing line between a risk that is “personalized” and one that is “general”. Under these circumstances, the Court may be faced with applicant who has been targeted in the past and who may be targeted in the future but whose risk situation is similar to a segment of the larger population. Thus, the Court is faced with an individual who may have a personalized risk, but one that is shared by many other individuals.

[23] Furthermore, Federal Court decisions demonstrate that the risk of being a victim of a criminal gang in Guatemala is generalized, not personalized (*Perez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1029, [2009] FCJ No 1275 (Perez); *Menendez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 221, [2010] FCJ No 254; *Vasquez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 35, [2011] FCJ No 38).

[24] For example, Justice Kelen stated the following in *Perez*:

[34] In this case the applicants were targeted because they owned a small business. The telephone harassment and threats after they shut down their business were a continuation of the extortion. There 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 (*Pineda v. Canada (MCI)*, 2007 FC 365, per Justice de Montigny).

[35] I am of the view that if the risk to violence or injury or crime is a generalized risk faced by all citizens of the country who are seen as relatively wealthy by the

criminals, the fact that a specific number of individuals may be targeted more frequently because of their wealth, does not mean that they are not subject to a “generalized risk” of violence. The fact that the persons at risk are those perceived to be relatively wealthy, and can be seen as a subset of the general population, means that they are exposed to a “generalized risk”. The fact that they share the same risk as other persons similarly situated does not make their risk a “personalized risk” subject to protection under section 97. A finding otherwise would “open the floodgates” in that all Guatemalans who are relatively wealthy, or perceived as being relatively wealthy, could seek protection under section 97 of IRPA.

[25] The following remarks by Justice Near in *Ventura v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1107, [2011] FCJ No 1361, also support this:

[20] The Applicant in this case was initially targeted because he was perceived as a wealthy small business owner. He claims to have been attacked a second time because he reported the incident to the police. Regardless, I agree with the Respondent that this does not take the Applicant outside the scope of a generalized risk. The Board acknowledged that while violence by the MS-13 gang was rampant, merchants were more frequent targets. The risk does not need to be faced by every person as long as it is prevalent and widespread (see *Osorio v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1459, [2005] FCJ No 1792). This Court has stated in *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, [2008] FCJ No 415, aff’d 2009 FCA 31, [2009] FCJ No 143 that section 97 can be interpreted to include a sub-group within the larger one that faces an even more acute risk. As in that case, the perception of the Applicant as a wealthy businessman could increase his chances of being victimized, but that does not mean the risk is no longer generalized.

[21] In addition, past threats to the Applicant as a small business owner by the MS-13 do not necessarily amount to a personalized risk (see *Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 991, [2010] FCJ No 1353 at para 18; *Perez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1029, [2009] FCJ No 1275 at para 34; *E.A.D.S. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 785, [2011] FCJ No 1110 at para 13).

[26] In the present case, the applicant was unable to identify who or which group he fears and, moreover, he does not believe that there was only one attacker or group (Tribunal Record, page 225). The evidence demonstrates that the amount demanded of the applicant (40,000 quetzales) is within the range of those extorted from transport company owners (between 30,000 and 50,000

quetzales) (Tribunal Record, page 35). Nevertheless, the applicant testified that the money demanded of drivers is minimal, as contrasted with the amount that was apparently demanded of him (Tribunal Record, page 238).

[27] The panel explained that, unlike Irma Verena Salazar Ortiz, who was threatened because she was trying to find out the truth about the murder of her spouse, Omar Alfredo Marroquin Alvarez (the applicant's cousin), the applicant was a victim of extortion because he was the administrator of his grandmother's company and they were going through him for the money because he had access to the funds (Decision of the panel, paragraph 20; *Menendez*). The affidavit concerning José Arnoldo Orrellana Hernandez does not mention that he was purportedly targeted as a member of the family, and the Court observes that Blanca Ondina Salazar Herrera reported police complicity. The Court also notes that the victims had a connection to a bus company. The evidence to which counsel for the applicant refers indicates that bus drivers and employees may be the subject of extortion or attacks (Tribunal Record, page 35).

[28] Finally, the applicant alleges that the panel erred in its decision by referring to "merchants" when the applicant is in fact an "administrator" (Decision of the panel, paragraph 24). Upon reading the decision, the Court is satisfied that the panel was well aware that the applicant was an administrator of his grandmother's company (Decision of the panel, paragraph 20). The general reference to the word "merchant" at the very end of the decision, when read in context, is not fatal and the Court cannot find that the panel's decision was unreasonable.

[29] To summarize, the Court is of the opinion that the panel took into account the applicant's specific situation and reasonably found that he had not provided specific and detailed evidence demonstrating that his family had been specifically targeted by the criminal gang in question. After reading the record and hearing the parties, the Court finds that the panel's decision, in light of the evidence before it, falls within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 47).

[30] For all of these reasons, the intervention of the Court is unwarranted and the application for judicial review is dismissed.

[31] There is no question to certify.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. This application for judicial review is dismissed.
2. No question will be certified.

“Richard Boivin”

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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DATED: February 17, 2012

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