

Federal Court



Cour fédérale

Date: 20120416

Docket: IMM-1242-11

Citation: 2012 FC 441

Toronto, Ontario, April 16, 2012

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

JOSE LUIS HERNAN MARTINEZ SAMAYOA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application concerns a decision of the Refugee Protection Division (RPD) in which the Applicant's claim for refugee protection under s. 97 of the *IRPA* was rejected based on the finding that his evidence of fear of the criminal gangs the MS-13 and the Mara-18 in Guatemala does not establish a personalized risk, but rather a generalized risk that does not qualify for protection as set out in s. 97(1)(b)(ii).

[2] At the time of the hearing before the RPD the Applicant was 32 years age. He was born in Guatemala, was raised in a Christian family, and attended a Christian college. At the age of thirteen, the Applicant began to be harassed by other children, at first simply because of his religiosity and refusal to join in misdeeds. When he was seventeen he was asked by his adolescent bullies to join them as a member of the Mara; he refused and, as a result, at age nineteen was attacked by the Mara. The Applicant immediately fled Guatemala for the United States, and subsequently made his claim for protection in Canada.

[3] The Applicant was unrepresented by Counsel at the hearing of his claim before the RPD. As a result, Counsel for the Applicant makes the principal argument that the Applicant was not afforded a fair hearing on the ground that the RPD Member failed to inform the Applicant of the crucial and complex legal and evidentiary issues with respect to what constitutes generalized risk as opposed to personalized risk if he were required to return to Guatemala.

[4] With respect to the fairness argument, the critical elements of the RPD Member's decision are as follows:

According to section 97(1)(b)(ii) of the *Act*, refugee protection is limited to those who face a specific risk that is not generally faced by others in or from that country.

The claimant testified that he has a fear for his life at the hands of organized criminal groups, particularly the MS-13 and Mara-18. The claimant was almost seventeen when he was first approached by the Maras and asked to join them, but he refused; subsequently, at the age of nineteen, he was beaten and threatened to be killed. The panel considered the claimant's psychological report and is cognizant of the impact that his problems with the Maras have had on him. The claimant is 31 years old now; however, he was in his teens when he was initially approached by the Maras. They continued to pursue him; at the age of nineteen, he was beaten by the Mara and

threatened with further harm to him and members of his family. The panel sympathizes with the claimant in that he encountered problems with the Mara in his late teens and early adulthood; however, the panel finds that the risk feared by the claimant is generally faced by other citizens in Guatemala. While the panel accepts the Court has mixed opinion on this matter, the panel finds direction from conclusion made by Justice Boivin in *Perez* [*Perez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 345], a case which specifically deals with the issue of forced recruitment. Albeit the country in this case was Honduras, the claimant also feared recruitment by the same criminal gang, accompanied by threats and violence. In this case, the panel finds there was insufficient evidence that the claimant was treated differently from others who are the target of recruitment by gangs in Guatemala. Justice Boivin concluded that the fact that the recruitment is personal does not necessarily mean that the risk is personalized, nor does it mean that the activity is not faced generally by other individuals. The claimant testified regarding the widespread violence at the hands of the organized criminal groups in the area where he had lived as well as in other areas within Guatemala. The Board's documentary evidence confirms the prevalence of deadly violence in Guatemala, especially at the hands of gang members.

The panel finds that this case falls under the exception of paragraph 97(1)(b) in that the risk of harm the claimant faces is generalized.

[...]

Based on the foregoing, the panel determines that the risk faced by the claimant is generalized rather than personalized risk, and, as such, the claimant's risk of harm falls under paragraph 97(1)(b)(ii) exception. Therefore, the panel determines that the claimant is neither a Convention refugee nor a person in need of protection.

[Footnotes omitted]

[Emphasis added]

(Decision, paras. 13-15 and 22)

[5] Thus, the issue of generalized and personalized risk was determinative of the Applicant's claim. As can be seen from the RPD Member's decision, it is a complex subject. The transcript reveals that at the hearing the RPD Member made an effort to explain key evidentiary requirements

of advancing a claim for protection, however, the effort did not include an explanation of generalized risk:

MEMBER: Now, I am going to go over the issues in regard to your claim. What I mean by issues is, there are areas that we need to get clarification on and also, some answers to questions.

[...]

MEMBER: In order to accept you as a convention refugee or a person in need of protection, you have to show me that you have a well founded fear of prosecution based on one of the five grounds in the convention definition, okay?

CLAIMANT: Okay.

MEMBER: And those grounds are race, religion, political opinion, nationality, or membership in a particular social group. So, if you belong to any of those five, you know, classes, then you fit the definition of ... to be considered as a convention refugee.

Okay, were you persecuted in Guatemala because of any of these five ... based on these five grounds?

CLAIMANT: No.

MEMBER: Okay. So what that means is that you do not have nexus to the convention definition, okay? You understand?

CLAIMANT: Yes.

[...]

MEMBER: Okay, so in the alternative, when you do not fit in the definition of convention refugee, what we do is we also consider you as a person in need of protection.

CLAIMANT: Okay.

MEMBER: Okay. A person of need ... in order to qualify as a person in need of protection, you will need to show me that you would face a risk to your life or a risk of unusual or cruel treatment or punishment or a danger of torture upon return to Guatemala, okay?

CLAIMANT: Okay.

MEMBER: So, these are two ways we consider people in need of protection.

Either they qualify as a convention refugee, or they qualify as a person in need of protection.

CLAIMANT: Okay.

MEMBER: Okay, since you told me that you were not persecuted because any of those five grounds, you do not fit in the definition of convention refugee. So, I am going to consider your claim in the alternative as a person in need of protection.

CLAIMANT: Okay.

[...]

MEMBER: Okay, so basically what I need to know, since you are stating that you face a risk to your life, I need to know what you fear, whom you fear, and why the person or persons, or the group or groups you fear, would wish to harm you. Okay?

CLAIMANT: Okay.

MEMBER: Now the main issues regarding your claim include: Delay in claiming, because you have been out of your country for some time.

CLAIMANT: Yes.

[...]

MEMBER: And then the other issue is failure to claim elsewhere. Since you were in the United States, I am going to be asking you question, why did you not file refugee claim in the United States.

CLAIMANT: Okay.

MEMBER: And then there is going to be credibility. Okay, credibility is an issue in all refugee protection claims and it refers to that what you have written and what you will say, if I believe it, okay?

CLAIMANT: Okay.

MEMBER: And in assessing credibility, we also see if there are any omissions or if there are any contradictions, or if there are any inconsistencies in your evidence, okay? For example, you may have told the immigration officer something, but you wrote something different in your narrative and you may come and tell me something different at the hearing. So, that will be contradiction or inconsistencies in your testimony, or in your evidence, okay?

Now the other issue that I am going to consider, is state protection. If you were having problems in Guatemala, did you go to the police? And if you did go to the police, what was the result of your efforts after going to the police, okay ... and why do you believe police cannot protect you due to your problems in Guatemala.

And then I am going to also try to ... I will have to establish who is the agent of persecution, like whom you fear, you know. What group of people, what is their profile, why, you know, like those people want to harm you.

So those are the issues, okay?

(Certified Tribunal Record, pp. 185-188)

MEMBER: Sir, I understand what you are saying, but the point is, whether you have shown through evidence that you fear criminality. These people they recruit people, young people, and if they do not comply with them, they threaten them, they hurt them, correct? And then, your family has been extorted of money, or they have been ... attempts have been made on them to extort money.

CLAIMANT: Yes.

MEMBER: That is what you have shown. And that is generalized risk of harm, which is criminality, which is ... not like... any Guatemalan citizen would be prone to because these are criminals, these are criminal groups MS 13 and 18.

(Certified Tribunal, pp. 209)

[6] In response to Counsel for the Applicant's fairness argument, Counsel for the Respondent correctly states that a self-represented claimant is not entitled to a higher degree of procedural

fairness (*Turton v Minister of Citizenship and Immigration*, [2011] FCJ No 1526; *Adams v Minister of Citizenship and Immigration*, 2007 FC 529). On this basis, Counsel for the Respondent argues that: the Applicant knew he had the burden to prove his claim under s. 97; generalized risk is a feature of that burden; and the RPD Member was under no obligation to spell this out to the Applicant.

[7] However, it is also correct that: a self-represented claimant must be pointed to “salient points of law and procedure” (*Wagg v Canada*, [2003] FCJ No 1115); ensuring a fair hearing is paramount; and the content of procedural rights afforded to a party is context-dependent and is to be determined on a case-by-case basis (*Law v Canada (Minister of Citizenship and Immigration)*, 2007 FC 160 at para. 19; *Nemeth v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 590, at para. 13; *Kamtasingh v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 45).

[8] Given the nature of the Applicant’s claim, and given that generalized risk was the focus placed on it by the RPD Member, I find that the Applicant was not accorded procedural fairness because the RPD Member failed to reasonably inform the Applicant of the legal and evidentiary features of the concept of generalized risk. As a result, I find that the decision under review as made in reviewable error.

[9] As a result, Counsel for the Applicant advances no question for certification, however Counsel for the Respondent advances the following question: Does procedural fairness require the Refugee Protection Division of the IRB to explain the applicant’s evidentiary burden to the applicant when s/he is unrepresented?

[10] In my opinion the question is not appropriate for certification because it does not raise a matter of general importance. The law on the issue is well established as explained in the reasons provided: the content of procedural rights afforded to a party is context-dependent and is to be determined on a case-by-case basis. In the present case the breach of procedural fairness was based on its facts.

ORDER

THIS COURT ORDERS that the decision presently under review is set aside, and the matter is referred back to a differently constituted panel for redetermination.

There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1242-11

STYLE OF CAUSE: JOSE LUIS HERNAN MARTINEZ SAMAYOA
v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 15, 2011

**REASONS FOR ORDER
AND ORDER BY:** CAMPBELL J.

DATED: April 16, 2012

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