Federal Court  Cour fédérale

Date: 20120607

Docket: IMM-7468-11

Citation: 2012 FC 716

Calgary, Alberta, June 7, 2012

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

JORGE ALBERTO MUNOZ

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, a citizen of El Salvador, was determined not to be a Convention Refugee or a person in need of protection. The Applicant claims refugee protection based on his fear of the gang in El Salvador called the MS-18. The Applicant owned a small food store and was forced to pay weekly extortion to the gang. When he was unable to make his payments the Applicant was badly beaten, and his life threatened. The RPD found that there was no nexus on Convention grounds and that the Applicant faced a generalized risk.

[2] The RPD accepted the Applicant's evidence with respect to his claim to be "reliable and trustworthy" (Decision, p. 2). The details of the Applicant's personal experience with the MS-18 are important because they form the basis for his claim that should he be required to return to El Salvador, it is probable he will be killed. The undisputed details are as follows:

> From 2003 forwards the Applicant and his wife were forced to pay weekly extortion for protection by MS 18. MS 18 referred to it as "rent". They had little money and they struggled to pay the rent but they managed to set aside some money in order to meet their demands because they were afraid of being killed.
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> The Applicant and his family lived this way for several years, until October of 2006, when the Applicant was unable to make a monthly payment. The Applicant was on his way home from his second job and he was ambushed by seven gang members. They beat him with sticks, belts, fists, anything they could find The Applicant suffered multiple injuries across his entire body and nearly died. He was in the hospital for three days. As evidence of his injuries the Applicant provided a medical report which can be found at page 40 of his disclosure which was before the Board as Exhibit 5 and is attached to his Affidavit as Exhibit B. After the Applicant was discharged from hospital he was again threatened by MS 18 that if he went to the police either he or a family member would be killed. The Applicant was also advised that he still owed his rent for the month of October, which he paid.
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> Time went by and the Applicant continued to make payments, sometimes late, owing to the economic hardships that he faced. Finally in September of 2008 the situation became unsustainable. The Applicant simply could no longer pay them their rent and in fact fell three months behind in his payments. Knowing that his life was now at risk the Applicant was forced to leave his home, his family and the job he had for 20 years. The Applicant went and stayed with his younger brother who lived in another town until he could find a way to leave the country. The Applicant's cousin, who owned a business, provided him with some work and he sent money back to his family so they could continue to pay the rent while he was in hiding. In October of 2008 the Applicant was fortunate enough to get a work visa to come to Canada where he decided to make a refugee claim.

> The Applicant is currently sending money back to his family and his wife continues to be targeted by MS 18 and is forced to pay rent on their store every week. Further, his family members have been directly threatened by MS 18 members that if the Applicant returns to El Salvador he will be killed. The Applicant's young daughter has written a letter outlining the threats she receives in relation to him. This letter can be found at page 6 of Exhibit B to the Applicant's Affidavit. On one occasion MS 18 even put a gun to the Applicant's daughters chest on her way to school and told her they had unfinished business with the Applicant. In desperation, the Applicant's wife even tried to file a police report on behalf of their daughter even though they knew it would not help. This report was filed in November of 2010 and can be found at page 11 of Exhibit B to the Applicant's Affidavit.
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> (Applicant's Memorandum, paras. 4 – 7)

[3] I agree with Counsel for the Applicant that, as a matter of law, the RPD was required to meet the criteria with respect to proving a claim under s. 97 of the *IRPA* as identified by Justice Zinn in *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210 at paragraphs 26 – 28:

> Parsing this provision, it is evident that if a claimant is to be found to be a person in need of protection, then it must be found that:
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> a. The claimant is in Canada;
> b. The claimant would be personally subjected to a risk to their life or to cruel and unusual treatment or punishment if returned to their country of nationality;
> c. The claimant would face that personal risk in every part of their country; and
> d. The personal risk the claimant faces "is not faced generally by other individuals in or from that country"
>
> All four of these elements must be found if the person is to meet the statutory definition of a person in need of protection; it is only such persons who are permitted to remain in Canada.
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> The majority of cases turn on whether or not the last condition has been satisfied, that is, whether the risk faced by the claimant is a risk faced generally by others in the country. I pause to observe that regrettably too many decisions of the RPD and of this Court use

> imprecise language in this regard. No doubt I too have been guilty of this. Specifically, many decisions state or imply that a generalized risk is not a personal risk. What is usually meant is that the claimant's risk is one faced generally by others and thus the claimant does not meet the requirements of the Act. It is not meant that the claimant has no personal risk. It is important that a decision-maker finds that a claimant has a personal risk because if there is no personal risk to the claimant, then there is no need to do any further analysis of the claim; there is simply no risk. It is only after finding that there is a personal risk that a decision-maker must continue to consider whether that risk is one faced generally by the population.
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> My second observation is that too many decision-makers inaccurately describe the risk the applicant faces and too many decision-makers fail to actually state the risk altogether. Subparagraph 97(1)(b)(ii) of the Act is quite specific: The personal risk a claimant must face is "a risk to their life or to a risk of cruel and unusual treatment or punishment." Before determining whether the risk faced by the claimant is one generally faced by others in the country, the decision-maker must (1) make an express determination of what the claimant's risk is, (2) determine whether that risk is a risk to life or a risk of cruel and unusual treatment or punishment, and (3) clearly express the basis for that risk.
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> [Emphasis added]

The evidentiary burden rested with the Applicant to prove the existence of each of the four criteria identified on a balance of probabilities, and the RPD had an obligation to determine whether the Applicant had met the evidentiary burden. It is agreed that the requirement on the Applicant to establish that no Internal Flight Alternative exists only arises when an established personal risk is found not to be generalized.

[4] With respect to the second criteria specified by Justice Zinn, being the nature of the Applicant's personalized risk, in the decision under review the RPD made the following two statements:

> You stated in your Personal Information Form ("PIF") and testimony that most neighbouring businesses were also forced to pay extortion to the Maras, like you. The truck drivers who made deliveries to your shop also had to pay. You stated that you had two friends extorted by the Maras, who were murdered. Based on the evidence and your testimony about others also targeted for extortion, I do not find that your risk is particularized. Regarding your personal circumstances, when you were asked why you were targeted for extortion, you stated it was because of your store. You also testified that you had never been extorted before and had never had problems with the Maras before 2003. In my view, the only reason you were targeted is because of your store and the belief that you had money. When you failed to pay, you were assaulted, and when you failed to pay a second time, you feared further reprisals. Now that your wife continues to work in the store, she, too, is required to pay and is not being held accountable for you debt. There are no circumstances here that distinguish your risk from that of other shopkeepers similarly targeted. [Emphasis added] (Decision paragraph 14)

and:

> It was argued that your case was no longer generalized once you ceased to pay and you were beaten and threatened and your family was threatened thereafter. Now, because of your non-compliance in payment, you will face retribution, which is not generally faced by others. In my view, retribution for non-payment of extortion always forms part of the crime of extortion. Fear of this is the reason people pay. If there was no retribution or consequence for non-payment, obviously people would not pay. I do not, therefore, find that retribution for non-payment can be separated from the crime of extortion. As stated, in *Ventura de Prada*, the individuals also experienced retribution for non-compliance, but this was still a generalized risk. (Decision, paragraph 19)

With respect to the RPD's statement at paragraph 19, Counsel for the Applicant makes the following argument:

> This is, with respect, flawed and over simplistic reasoning. The entire decision is assessed on the premise that the risk the Applicant faces in El Salvador is one of extortion and that the risk of death the Applicant faces due to his non-compliance, is merely a by-product of the extortion and not the actual risk itself. The risk the Applicant faces is not one of extortion but a risk of death due to his failure to meet the demands of Mara 18. The two are obviously not the same.

> In this case, the retribution would be the death of the Applicant at the hands of hyper violent international gang. In another case the retribution may not potentially be as dire. It depends on the specific factual circumstances.
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> (Applicant's Memorandum of Argument, p. 2)

[5] I agree with this argument. Despite the detailed and cogent evidence produced by the Applicant on the second criterion, the RPD made no precise finding as to the nature of the personal risk advanced by the Applicant, which, in turn, negated the obligation on the part of the RPD to determine whether that risk was probable in El Salvador should he be required to return to El Salvador.

[6] With respect to the fourth criterion identified by Justice Zinn, being whether the personal risk the claimant advances is not faced generally by other individuals in or from El Salvador, Counsel for the Applicant makes the following argument:

> In this case, the Board should have assessed whether the potential retribution to the Applicant from MS 18 amounted to a risk to his life and then gone on to assess whether that particular risk was personal and not one faced generally by others in the country. There was no attempt to do either. Further, there is no evidence before the Board that a significant subset of the population in El Salvador is facing death for their failure to pay Mara 18 extortion demands.
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> (Applicant's Memorandum of Argument, p. 3)

[7] I also agree with this argument. In my opinion the RPD did not exhibit an understanding of the need to clearly define the characteristics and the size of the population against whom the Applicant's experience is being compared in arriving at the conclusion that the Applicant's risk is

generalized. Justice Crampton (as he then was) clearly identifies this requirement in *Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 82, at paragraphs 32 – 33:

> Given the conjunctive nature of the two elements contemplated by paragraph 97(1)(b)(ii), a person applying for protection under section 97 must demonstrate not only a likelihood of a personalized risk contemplated by that section, but also that such risk "is not faced generally by other individuals in or from that country." Accordingly, it is not an error for the RPD to reject an application for protection under section 97 where it finds that a personalized risk that would be faced by the applicant is a risk that is shared by a sub-group of the population that is sufficiently large that the risk can reasonably be characterized as being widespread or prevalent in that country. This is so even where that sub-group may be specifically targeted. It is particularly so when the risk arises from criminal conduct or activity.
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> Given the frequency with which claims such as those that were advanced in the case at bar continue to be made under s. 97, I find it necessary to underscore that is now settled law that claims based on past and likely future targeting of the claimant will not meet the requirements of paragraph 97(1)(b)(ii) of the IRPA where (i) such targeting in the claimant's home country occurred or is likely to occur because of the claimant's membership in a sub-group of persons returning from abroad or perceived to have wealth for other reasons, and (ii) that sub-group is sufficiently large that the risk can reasonably be characterized as being widespread or prevalent in that country. In my view, a subgroup of such persons numbering in the thousands would be sufficiently large as to render the risk they face widespread or prevalent in their home country, and therefore "general" within the meaning of paragraph 97(1)(b)(ii), even though that subgroup may only constitute a small percentage of the general population in that country.
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> [Emphasis added]

My only observation with respect to Justice Crampton's statement about the size of the sub-group in which a risk might be "widespread or prevalent" in a country is that it depends on the circumstances of each individual case.

[8] In the present case I find that the RPD failed to clearly define the characteristics and size of the population against whom the Applicant's experience is being compared. It is not enough to say, as did the RPD in paragraph 14 of the decision as quoted above, that the sub-group is "other shopkeepers similarly targeted". With regard to the evidence accepted by the RPD, the critical questions that remained unanswered in the making of this finding are: who are the persons that face the risk to life or cruel and unusual treatment or punishment in common with the Applicant; what is the size of that population of people; and do the characteristics and size of that population, or sub-group, make the Applicant's risk personal or generalized?

[9] Defining the characteristics of the sub-group is particularly important. In the present case the following features of a potential sub-group were established by the Applicant: shopkeepers who are extorted; and who have not met extortion demands; and who have suffered severe bodily harm and death threats; and who continue to receive death threats communicated through family members, together with death threats directed against family members. It was for the RPD to determine whether persons who have had the same experience as the Applicant form a sub-group of a character and size sufficient to make the Applicant's risk a generalized risk.

[10] In the sub-group determination just described, a point might be found where a personalized as opposed to a generalized risk exists. In the present case, on the evidence produced by the Applicant, the turning point might be found where the Applicant's conduct of not paying money in response to extortion demands drew particular attention to him personally, or perhaps when the extortion threats became actualized in extreme violence and escalating death threats against the

Applicant and his family. It was for the RPD to determine whether these, or any other turning point existed.

[11] As a result I find that the decision under review was rendered in reviewable error.

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 on the following direction:

Because the RPD's decision is being set aside only for failure to apply the evidence according to law:

1. The redetermination be conducted on the basis of the evidence produced before the RPD to date, and any other evidence which either the Applicant or Respondent might produce; and

2. The redetermination be conducted on the basis that the Applicant's evidence produced to date is "reliable and trustworthy".

There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Bjorn Harsanyi	FOR THE APPLICANT
W. Brad Hardstaff	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stewart Sharma Harsanyi Barristers & Solicitors Calgary, Alberta	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT