Federal Court  Cour fédérale

Date: 20131021

Docket: IMM-2069-13

Citation: 2013 FC 1054

Ottawa, Ontario, October 21, 2013

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

JULIAN AUBREY STEPHEN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated February 15, 2013. The RPD determined that the Applicant is not a convention refugee and not a person in need of protection pursuant to sections 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). This application is brought pursuant to subsection 72(1) of the IRPA.

Background

[2] The Applicant is a citizen of Saint Lucia. He claims that in March 2009, he was approached by members of a drug gang and asked to sell drugs on their behalf. He refused. The following day his mother's home, where he resided, was broken into. He reported this to the police who came to the home to investigate.

[3] In April 2009, he was again stopped by members of the gang who told him that he should start working with them to sell drugs. He again refused. The next day his mother's house was again broken into, and food and appliances were taken. He and his mother made a report at the police station and later followed up, but were advised that the police had nothing to report.

[4] The Applicant was not approached again until a year later, in April 2010, when members of the same gang picked him up, drove him around in a vehicle and again asked him to sell drugs on their behalf. He refused and was released. He was again approached in September, October and December 2010. In April 2011, six gang members came to his home, tied him and his mother up and threatened their lives if he did not agree to sell drugs on their behalf.

[5] Following this incident, his mother immediately moved to another town. The Applicant continued his employment but no longer slept at home, instead staying with different family members. The Applicant came to Canada on September 29, 2011 and claimed refugee protection on November 8, 2011.

[6] By its decision dated February 15, 2013, the RPD found that the Applicant is not a convention refugee or a person in need of protection pursuant to section 96 and subsection 97(1), respectively, of the IRPA (the Decision).

Decision Under Review

[7] The RPD stated that the Applicant testified in a straightforward manner, and that there were some relevant inconsistencies in his testimony and contradictions between his testimony and other evidence which were not satisfactorily explained. With respect to the threats against him, the Applicant did not submit any affidavits, letters or other supporting documentary evidence other than a letter from his mother. He also failed to produce police reports to corroborate his reporting of the two break-ins, his testimony being that he had tried to obtain them but that they were not provided by the police. The RPD found that the Applicant had failed to provide "sufficient and credible trustworthy evidence" that he had been threatened by gang members.

[8] The RPD found that the Applicant's fear in this case was not linked to race, religion or nationality, political opinion or membership in a particular social group. He was a victim of crime which did not serve to establish a nexus between his fear of persecution and one of the convention grounds. Accordingly, his section 96 claim failed.

[9] The RPD next considered whether the harm feared by the Applicant was such that it posed a risk to his life or a risk of cruel and unusual treatment or punishment thereby qualifying him as a person in need of protection pursuant to subsection 97(1)(b) of the IRPA. The RPD found, on a balance of probabilities, that the Applicant was a victim of unknown gang members and was being

threatened with physical harm and perhaps even death but that this is one of the many crimes which occur in Saint Lucia and was not specific to the Applicant.

[10] The RPD found that the fact that the first time the Applicant was approached by the gang members they called him by his nickname, "Jay", did not make the risk personalized, particularly as the Applicant had testified that he was well-known in the area. The use of his nickname in the first of the nine incidents was alone not sufficient to personalize the risk.

[11] The RPD referenced case law and concluded that, if the risk of violence or injury or crime is a generalized risk faced by all citizens of Saint Lucia, then the fact that a specific number of individuals may be targeted more frequently does not mean that they are not subject to a general risk of violence. The fact that they share the same risk as other persons similarly situated does not make the risk a "personalized risk". As the risk faced by the Applicant was generalized rather than personalized, it therefore fell within the subsection 97(1)(b)(ii) exclusion.

[12] The RPD then considered the question and principles of state protection and found that the Applicant had not rebutted the presumption, with clear and convincing evidence, of Saint Lucia's ability to protect its citizens. The Applicant had reported two incidents to the police, however he did not produce any corroborative evidence of these reports. Based on its review of the national documentation package, the RPD found that on a balance of probabilities Saint Lucia is making serious efforts to protect its citizens and while those efforts may not always be successful, that did not rebut the presumption of state protection. Further, that a claimant must approach the state for protection if such protection might be reasonably forthcoming. The Applicant had not provided a

compelling explanation for failing to pursue state protection opportunities as he had approached the Saint Lucia police only once and did not approach them again during the two year period that he was involved in at least nine incidents. He had also not produced any corroborative documentary evidence, such as police reports or affidavits, to support his claim.

Issues

[13] I would frame the issues as follows:

1. Did the RPD make an erroneous credibility finding?
2. Did the RPD err in its finding on generalized risk?
3. Did the RPD err in finding that the presumption of state protection was not rebutted?

Standard of Review

[14] An exhaustive analysis is not required in every case to determine the proper standard of review. Courts must first ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a decision-maker with regard to a particular category of question (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 57 and 62 [*Dunsmuir*]; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 53 [*Khosa*]).

[15] Prior jurisprudence has established that credibility findings, sometimes described as "the heartland of the Board's jurisdiction", are in essence pure findings of fact that are reviewable on a reasonable standard (*Khosa*, above, at para 46; *Aguilar v Canada (Minister of Citizenship and Immigration)*, 2013 FC 843 at para 34).

[16] It is well settled that the standard of review of a decision on generalized risk is also reasonableness as it is a question of mixed fact and law (*De Jesus Aleman Aguilar v Canada (Minister of Citizenship and Immigration)*, 2013 FC 809 at para 20 [*De Jesus Aleman Aguilar*]; *Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678 at para 18 [*Portillo*]). Issues of state protection and of the weighing, interpretation and assessment of evidence are reviewable on a reasonableness standard (*Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para 38 [*Hinzman*]; *Burai v Canada (Minister of Citizenship and Immigration)*, 2013 FC 565 at para 22; *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045 at para 38).

[17] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it. It is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence. (*Dunsmuir*, above, at para 47; *Khosa* above, at para 59).

[18] Adequacy of reasons is no longer a stand alone ground of review but is subsumed within the reasonable analysis (*Newfoundland and Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at paras 14-16 [*Newfound and Labrador Nurses' Union*]).

[19] Accordingly, the standard of review applicable to all of the issues arising from this matter is reasonableness.

Analysis

Credibility

[20] The Applicant submits that it was not clear from the RPD's reasons whether or not it found him to be credible. While the RPD states that the Applicant testified "in a straightforward manner," it also found that there were some relevant inconsistencies in his testimony and contradictions between his testimony and other evidence which were not satisfactorily explained. The Applicant submits that typically, straightforward testimony is consistent testimony and notes that the alleged contradictions and inconsistencies are not identified.

[21] Further, while in paragraph 10 of its Decision the RPD found that the Applicant had not provided sufficient, critical and trustworthy evidence that he had been threatened by gang members, in paragraph 15, it found, on a balance of probabilities, that the Applicant was a victim of alleged unknown gang members and was threatened with physical harm and perhaps even death states, but that this was one of the many crimes which occurs in Saint Lucia and was not specific to the Applicant. The Applicant submits that these two inconsistent findings on credibility cannot be reconciled thereby rendering the Decision unintelligible and unreasonable. As the finding of whether the Applicant was credible or not goes to the heart of the reasons, the Decision cannot stand (*Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 228 (QL) (CA) [*Hilo*]; *Yotheeswaran v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1236 [*Yotheeswaran*]; *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA) [*Maldonado*]).

[22] The Respondent acknowledges the inconsistency between paragraphs 10 and 15 of the Decision but submits that the RPD stated the basis for its Decision at paragraph 9 which was that the Applicant had failed to provide sufficient and credible trustworthy evidence of the alleged harm or risk and failed to provide an explanation for not having provided affidavits or letters from friends or relatives supporting his claim of threats of harm other than one letter from his mother.

[23] Further, although the Applicant testified in a straightforward manner, this finding addresses only his manner of presentation. There are reasons to doubt his story, in large part due to a lack of evidence. Further, as the RPD rejected the claim based on an insufficiency of evidence and not on a credibility finding, *Hilo*, above, has no application.

[24] In my view, having regard to the whole of the RPD's reasons, it is not possible to determine with any certainty whether or not the RPD found the Applicant to be credible.

[25] The RPD starts its analysis by stating that where a claimant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there is reason to doubt their truthfulness. While no case law is cited, this principle is in keeping with the Court's decision in *Maldonado*, above at page 305.

[26] Later, the RPD states that the claimant testified in a straightforward manner "and" that there were some relevant inconsistencies in his testimony with contradictions between his testimony and other evidence before it which had not been satisfactorily explained. Yet, the RPD does not identify

these inconsistencies or contradictions which leaves open the question of how, or if, they affect the Applicant's credibility.

[27] The fact that the Applicant testified in a "straightforward manner" may, or may not, speak to credibility. On the one hand, such a manner may suggest that the testimony being given flowed smoothly because it was truthful. On the other hand, it may simply be that an applicant practiced his or her testimony thereby achieving a straightforward manner. The point being that, without more, little can be gleaned from this statement as to the Applicant's credibility.

[28] However, while the Decision lacks intelligibility with respect to its assessment of the Applicant's credibility, this does not affect the ultimate outcome. That is because regardless of whether the RPD found the Applicant to be credible, or not, it continued to conduct both a section 96 and 97 analysis. The Applicant does not challenge the RPD's finding or its conclusion that he is not a convention refugee as there is no nexus between his alleged fear and a section 96 convention ground.

[29] As regards to the section 97 analysis, the RPD stated that it found, on a balance of probabilities, that the Applicant was a victim of unknown gang members and was being threatened with physical harm and perhaps even death. Thus, it must be inferred that for the purposes of its section 97 analysis, the RPD found the Applicant to be credible.

Generalized Risk

[30] The Applicant submits that the RPD's finding of generalized risk was made without proper analysis and was therefore unreasonable.

[31] Specifically, that the RPD failed to perform, in the manner previously proposed in *Portillo*, above, an assessment of whether the risk facing the Applicant was personalized and that its reasoning failed to take into account the true nature of the risk.

[32] The Applicant submits that the risk was personalized as he was targeted because of his particular characterization of being well-known, making him a good candidate to be a drug dealer. The fact that the gang members called him by his nickname, "Jay", when they approached him on the first of nine occasions was an indication that he was being personally targeted. His refusal to cooperate resulted in him being placed at risk.

[33] Further, the Applicant submits that there was no analysis of how common it is for persons from Saint Lucia to be approached to sell drugs, the repercussions for those who refuse nor was there any basis to support the RPD's view that these situations are prevalent.

[34] The Respondent submits that the evidence tendered by the Applicant in support of his claim is limited to his testimony, his PIF, two letters from his mother, a statutory declaration concerning domestic abuse situations in Saint Lucia prepared and filed in another matter, and, the general country condition documents. The RPD reasonably found that this evidence was insufficient to support the Applicant's claim that his risk was personalized.

[35] The Respondent also submits that the RPD did identify the risk and correctly concluded that it was generalized. The Applicant described the risk in his PIF as being threatened by drug dealers because they asked him to sell drugs for them which he refused. This is the same risk described in the RPD's reasons. Further, the RPD reasonably rejected the argument that the Applicant was subjected to heightened or personalized risk because he was called by his name on the first of nine occasions when he was approached to sell drugs. The RPD relied on the documentary evidence which established that crime relating to drug trafficking is prevalent in Saint Lucia, the risk faced by the Applicant is therefore, the same risk faced by the general population.

[36] Further, the Respondent submits that there is no objective evidence to support the Applicant's position that his risk was personalized due to being targeted by drug dealers because he was well known and therefore would be a good drug dealer himself. This is not alleged in his PIF and his testimony was that it could be a possibility. Nor was there evidence that his refusal placed him at a higher risk.

[37] In my view, the RPD reasonably found that the Applicant was subject to a generalized risk and, therefore, fell within the subsection 97(1)(b)(ii) exclusion.

[38] In *Portillo*, Justice Gleason proposed a framework for the analysis required under subsection 97(1) of the IRPA as follows:

> [40] In my view, the essential starting point for the required analysis under section 97 of IRPA is to first appropriately determine the nature of the risk faced by the claimant. This requires an assessment of whether the claimant faces an ongoing or future risk

> (i.e. whether he or she continues to face a "personalized risk"), what the risk is, whether such risk is one of cruel and unusual treatment or punishment and the basis for the risk. Frequently, in many of the recent decisions interpreting section 97 of IRPA, as noted by Justice Zinn in *Guerrero* at paras 27-28, the "... decision-makers fail to actually state the risk altogether" or "use imprecise language" to describe the risk. Many of the cases where the Board's decisions have been overturned involve determinations by this Court that the Board's characterization of the nature of the risk faced by the claimant was unreasonable and that the Board erred in conflating a highly individual reason for heightened risk faced by a claimant with a general risk of criminality faced by all or many others in the country.
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> [41] The next required step in the analysis under section 97 of IRPA, after the risk has been appropriately characterized, is the comparison of the correctly-described risk faced by the claimant to that faced by a significant group in the country to determine whether the risks are of the same nature and degree. If the risk is not the same, then the claimant will be entitled to protection under section 97 of IRPA. Several of the recent decisions of this Court (in the first of the above-described line of cases) adopt this approach.

[39] The RPD's characterization of the nature of the risk was reasonable based on the evidence before it. It found that there was no persuasive evidence that the Applicant was targeted for any other reason than that he was approached by an unknown gang of men to sell drugs for them. This is consistent with the Applicant's PIF where he stated, "I have been threatened by drug dealers because they asked me to sell drugs for them and I refused to do that". At his hearing, when asked if he knew why the gang persisted for two years in their efforts to have him join them, his response was, "I'm not sure, but I would say a possible reason could be that they think I know many people". When questioned by his own counsel who asked whether the gang's initial approach in 2009, was "random" or whether he was "specifically approached", the Applicant responded that he was specifically approached because they addressed him by his nickname.

[40] The RPD found that the Applicant was a victim of unknown gang violence and was being threatened with physical harm or perhaps even death but that this is one of the many crimes which occur in Saint Lucia and is not specific to the Applicant. Further, because he was well known in the area, the fact that he was called "Jay" at the first encounter with the gang did not, alone, constitute personalized risk since he was not called that on the following incidents.

[41] The jurisprudence cited by the RPD supports its finding that if the risk of violence or injury is a generalized risk faced by all citizens in Saint Lucia, the fact that a specific number of individuals may be targeted more frequently does not mean that they are not subject to a generalized risk of violence (*Innocent v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1019 [*Innocent*]; *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331 [*Prophète*]; *Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 11 [*Rodriguez*]). The fact that they share the same risk as other persons similarly situated does not make the risk personalized (*Rodriguez*, above at para 35).

[42] It is clear that an analysis under subsection 97(1)(b)(ii) is largely contextual and entails a case-by-case determination of the particularized risk faced by a claimant (*De Munguia v Canada (Minister of Citizenship and Immigration)*, 2012 FC 912 at para 25; *Vivero v Canada (Minister of Citizenship and Immigration)*, 2012 FC 138 at para 11). Where the general public is subject to a risk of crime, the fact that some individuals are more exposed to the risk than others whether because of perceived wealth (*Innocent*, above; *Prophète*, above; *Rodriguez*, above) or because they

live in more dangerous areas (*Innocent,* above) or otherwise does not necessarily make them persons in need of protection under section 97.

[43] The jurisprudence has also recognized that a generalized risk can become personalized. In that regard, the RPD has a duty to conduct an individual and thorough analysis of the facts presented, examining all aspects of the risk stemming from those facts and determining whether the risk has become personalized even if the claimant was initially a random target. In *Pineda v Canada (Minister of Citizenship and Immigration)*, 2011 FC 403 [*Pineda*], which is factually distinct from the present case, Justice Snider states the following:

> [12] I acknowledge that, on a basic level, the Applicant is a victim of crime. However, the facts of this case are unusual in that the Applicant claims to have been personally and directly targeted by MS-18. The Board did not question the credibility of this aspect of his claim. In other words, this is not a generalized fear of being targeted by MS-18 just because the Applicant is a citizen or because of his profile as a doctor. The nature of the risk he now faces is not the same as the risk he faced prior to treating the gang member - before he treated the gang member, he was susceptible to extortion or violence, whereas now he is specifically and individually targeted for his perceived actions, unlike the general population.
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> [13] In virtually all of the cases cited by the Respondent, the applicants were not targeted personally per se. While the gangs may have known their names, their personal information, and may have even threatened them or assaulted them on a number of occasions, the nature of the threat was still generalized. The gang could have gone after anyone with perceived wealth, or any young person who may be recruited into their gang. These people were essentially means to an end for the gang members. I doubt that it really mattered whether person A or person B gave the gang the money for which they were searching, even if both parties were personally threatened. Similarly, I doubt that it really mattered whether person C or person D joined their cause, provided that they continued to increase their membership. The situation before me is fundamentally different. The Applicant presented a story to the Board of being at risk because he was perceived to be a person who "ratted out" an individual gang member.

[44] The above case clearly reflects a scenario where the Applicant was specifically and individually targeted for his perceived actions, unlike the general population. However, it also establishes that just because gang members may have known a victim's name, personal information, or threatened or assaulted them on numerous occasions, is not for that reason alone sufficient to personalize the risk (*Pineda*, above, at para 13; *Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213 at para 14 [*Acosta*]).

[45] Here, the RPD considered the only evidence offered by the Applicant as to his personalized risk, being the fact that he was well-known and that when he was initially approached, the gang referred to him by his nickname. In my view, the RPD reasonably found that this alone does not constitute personalized risk. The very fact that he was well-known, by his own evidence, would explain why they called him by his nickname and, in any event, case law has held that reference to a victim's name and personal information is insufficient by itself to render the risk personal (*Pineda*, above; *Acosta*, above).

[46] The RPD reasonably based its finding that there was no personalized risk on the lack of evidence to support that claim. As Justice Gagné stated in *Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 426 [*Gonzalez*] at paras 17-18:

> [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 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 then 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).

[47] That is also the situation in this case. This is not a situation where the RPD failed to consider the individual circumstances of the Applicant and, based on the evidence before it, the RPD reasonably found that the Applicant did not face personalized risk of harm but that his risk was generalized and, therefore fell, within the subsection 97(1)(b)(ii) exclusion.

[48] As the finding on generalized risk alone is sufficient to uphold the RPD's decision, the state protection issue need not be addressed (*Gonzalez Ventura v Canada (Minister of Citizenship and Immigration)*, 2012 FC 10 at para 62).

[49] I also find that while the RPD made several minor errors in its Decision, such as referring to the risk as one faced generally by the population of "Hungary", reading the decision as a whole indicates that these were clerical errors insufficient to render the Decision void (*Adams v Canada (Minister of Citizenship and Immigration)*, 2008 FC 256 at paras 17-18; *Chen v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1218 at para 17).

[50] The Decision was reasonable and as such falls within the range of possible acceptable outcomes and is defensible in respect to the facts and law.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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