Federal Court Cour fédérale

Date: 20100225

Docket: IMM-3830-09

Citation: 2010 FC 221

Ottawa, Ontario, February 25, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

MYNOR MARTINEZ MENENDEZ
SONIA NINETH CASTANEDA DE MARTINEZ
ALICIA MARTINEZ CASTANEDA
MELISSA MARTINEZ CASTANEDA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision dated July 8, 2009, by the Refugee Protection Division of the Immigration and Refugee Board (the Board), wherein the Board found the applicants were not Convention refugees or persons in need of protection pursuant to subsections 96 and 97(1) of the Act.

Factual Background

[2] The applicants, Mynor Martinez Menendez (the principal applicant), his wife Sonia Nineth Castaneda de Martinez, and their two minor children, Alicia Martinez Castaneda and Melissa Martinez Castaneda, are citizens of Guatemala who claim refugee protection on the basis of an alleged risk of extortion and kidnapping by organized criminal gang members (maras). They base their claim on their political opinion and on membership in a particular social group: people who fear kidnapping by organized criminals.

[3] During his career, the principal applicant has been a senior administrator for, or consultant to, various international development non-governmental organizations (NGOs) in Central America.

[4] On September 27, 2005, the principal applicant travelled to France to study at the Institute of Development Bioforce in Lyon. He returned to Guatemala on July 15, 2006. On August 1, 2006, the principal applicant began a one-year contract with a French agricultural and veterinary non-governmental organization (NGO) called "Agronomes et Vétérinaires Sans Frontières – France" (AVSF) as an Agricultural Development Project Consultant. He was given signing authority for the NGO's bank accounts in order to buy materials and pay invoices.

[5] On August 14, 2007, the principal applicant allegedly received a threatening phone call at home from an unknown individual indicating his family was being watched and he should give the group what he assumed was money. He reported the incident to the police the following day and

was advised to make a denunciation at the General Direction of the National Civil Police, Division of Criminal Investigation (DINC). The DINC advised the applicant to reconnect his phone, find out what the caller wanted and negotiate with him in the event he wanted money. The DINC followed up but provided no other protection. The principal applicant subsequently noticed people watching his house from cars parked in the lot across the street and graffiti on the outside walls of his house which he believes were made by gangs.

[6] On September 15, 2007, the principal applicant was approached by four men in the parking lot of a local market. The men appeared to be gang members by their appearance and told the principal applicant he had 24 hours to give them Q100,000.00 (approximately $12,000.00 CDN) or they would kidnap or kill one of his daughters.

[7] The principal applicant believed that the men were members of a criminal gang who were trying to extort money from him but thought it would be useless to report it to the police. Instead, he took his family to live with relatives (an uncle) in the north of the city. His daughters continued to attend their school. The principal applicant continued to work but never advised his employer of the threats he was receiving because he did not want to get them involved.

[8] On October 16, 2007, the applicants obtained Canadian visitor visas and flew to Canada on November 7, 2007. They claimed refugee protection on November 20, 2007.

[9] The applicant heard that at the beginning of October 2007, a man had come to the school asking for his daughters. The applicant also indicated that some NGO workers in Guatemala had been threatened. The applicant states he has been told he continues to receive calls from strangers asking for him and he was asked to return to the District Attorney's office.

Impugned Decision

[10] The Board found the applicants would not be subject to a personalized risk under section 97 of the Act due to the principal applicant's profile as an employee of an international NGO. The Board held that the alleged particular social group, people who fear kidnapping or extortion from criminal gangs, does not constitute a particular social group within the meaning set out in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 153 N.R. 321. Based on the documentary evidence, the Board noted that all people in Guatemala face a generalized risk of harm from criminal gangs, with some groups of the population being targeted more frequently than others. The Board also found the applicants' allegation of having been personally targeted in the past by criminal gangs to be lacking in credibility.

[11] With respect to credibility, the Board gave little weight to the applicants' assertion that criminal gang members visited the daughters' school and passed by their house following their departure from Guatemala. The neighbours and the person at the school who reported these incidents to the principal applicant did not say the individuals in question were gang members, which the Board notes would have been apparent from their tattoos, manner of dress, language and use of signs. The Board also gave little weight to the alleged telephone hang-ups and graffiti on the

wall as the identity of the perpetrators was equally unknown. The fact that the applicants were not approached or harmed by criminal gangs between the initial threats and the time they left for Canada seven weeks later also undermined their credibility to have been targeted by criminal gangs.

[12] Under section 96 of the Act, the Board found that there is not sufficient credible or trustworthy evidence to support a nexus to the Convention grounds of political opinion or particular social group. The Board rejected the applicant's submission that the criminal organization, which the applicants fear, acts as the "*de facto*" government in some areas of Guatemala. Therefore refusal to pay extortion would be seen as a political act because the country evidence shows gangs do not form the "*de facto*" government in Guatemala.

[13] Under section 97, the Board determined that the risks faced by the applicants (extortion, kidnapping and death by local gangs or maras) are ones faced by all people in Guatemala, although some groups are targeted more than others. The Board therefore added that the applicants would not be personally subject to a risk because of their particular circumstances.

[14] Nevertheless, in his decision, the Board addresses the question of whether the applicants, as they allege, may have been "individually targeted" or "actively targeted" by maras. The Board concludes the applicants have not been so targeted since others in Guatemala have also been targeted for extortion. The Board also noted that the applicant has not been personally targeted because the maras engaged in no follow-up with the applicant's family after he left Guatemala.

<u>Issues</u>

[15] The applicant raises the following issues:

1. Did the Board err in its interpretation of section 97: what does it mean to be "personally targeted" or face a "personalized risk"?

2. Did the Board make crucial credibility findings unreasonably and without regard to the evidence before it?

3. Did the Board err by ignoring the evidence that the applicant was a member of a "particular social group" because of his occupation, or in the alternative, he faced a heightened risk of harm because of that occupation?

<u>Standard of Review</u>

[16] The respondent submits, and the Court agrees that the application of sections 96 and 97 of the Act to the particular facts of the applicants' case is a question of mixed fact and law which is to be reviewed on the standard of reasonableness (*Acosta v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 213, [2009] F.C.J. No. 270 (QL)).

1. Did the Board err in its interpretation of section 97: what it means to be "personally targeted" or face a "personalized risk"?

[17] The applicants submit that the Board's decision cannot stand as the Board erred in its interpretation of what constitutes a risk "not faced generally by other individuals in or from" Guatemala in this case.

[18] Where there has already been a personal threat or attack or other evidence of risk, the applicants argue that personalized threat must be considered, regardless of what generalized risk may be faced by others in the same country. At the hearing, counsel for the applicants submitted that the facts in *Pineda v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 365, 161 A.C.W.S. (3d) 467 were similar to the facts in the case at bar. In *Pineda*, this Court found that the claimant had already been targeted. Therefore the applicant is of the view that the Board should have considered that factor as a “personalized risk”. The Court does not agree with the applicants. In the *Pineda* case, the claimant had been personally targeted on more than one occasion and over quite a long period of time. Moreover, Mr. Pineda had been targeted not has a victim but rather for recruitment into the Gang. On the basis of these facts, the Court finds that the *Pineda* case can be distinguished and is therefore not analogous to the case at bar as alleged by the applicants *(Acosta)*.

[19] Further, based on *Surajnarain v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1165, 336 F.T.R., the applicant submits that a risk can indeed be faced by a sub-group. However, this Court in *Prophète v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, 167 A.C.W.S. (3d) 151 at par. 23, rejected the allegation that a person faces a personalized risk of violence by being a member of a group that may be targeted more frequently because of their wealth. Based on *Prophète*, the Court agrees with the respondent that it was reasonably open to the Board to determine, on the facts of this case, that the applicants did not face a personalized risk of harm due to the principal applicant’s employment with an agricultural and veterinary non-governmental organization which may be targeted more frequently than other groups.

[20] Given the wording of subsection 97(1)(*b*)(ii) of the Act, the applicants must satisfy the Board that they would be personally subjected to a risk which is not generally faced by others in Guatemala. The Board reasonably found that the applicants are members of a large group of people who may be targeted for economic crimes in Guatemala on the basis of their perceived wealth (*Carias v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 602, [2007] F.C.J. No. 817 (QL) at par. 23 and 25). The Court finds the applicants have not succeeded in establishing that they were personally threatened by the criminal gangs in Guatemala.

2. Did the Board make crucial credibility findings unreasonably and without regard to the evidence before it?

[21] The applicants submit the Board's findings of fact with respect to the incidents of targeting were obviously central to his decision. The applicants argue that the Board's rejection of this evidence, on grounds of credibility, was unreasonable, as it was made without regard to the evidence before the Board.

[22] The Board doubted the applicants' persecutors were members of an organized crime gang because neither the applicant nor the school authorities mentioned the "identifiers" to the maras gang. Further, the Board gave little weight to the applicants' assertion that members of criminal gangs visited their daughters' school and their house following their departure from Guatemala as the people who reported these incidents to the principal applicant did not say whether these individuals were gang members. The Board also questioned the alleged telephone hang-ups and graffiti on the wall because the identity of the perpetrators was unknown. The fact that the applicants were not approached or harmed by criminal gangs between the initial threats and the time

they left for Canada - seven weeks later - was also found to undermine their claims to have been targeted by criminal gangs. Based on the facts and the evidence, the Court finds that the Board's credibility findings were thus open to it. The Board reasonably concluded that the applicant's lacked credibility regarding the identity of the gang members who allegedly persecuted them.

3. Did the Board err by ignoring evidence that the Applicant was a member of a "particular social group" because of his occupation, or in the alternative, he faced a heightened risk of harm because of that occupation?

[23] According to the applicant, the Board only briefly deals with the evidence on country conditions, firstly to rebut the applicants' argument that Guatemala is a failed state where organized crime acts as the "*de facto*" government and, secondly to establish that crime in Guatemala is high and generalized.

[24] In support of these arguments, counsel for the applicants submits that the Board failed to consider the country's conditions and that the main applicant, as signing officer with an international NGO, is at risk in Guatemala. As evidence, the applicant submitted a number of documents confirming that members of NGO's are at risk in Guatemala. The difficulty with that evidence stems from the fact that it relates clearly to human rights activist, advocates of marginalized group or activists which is clearly not the case of the principal applicant. In fact, the principal applicant worked for an agricultural and veterinary non-governmental organization in an administrative capacity, in charge of accounting and finance. Thus, on the basis of the evidence on record, the principal applicant can hardly be defined as a human rights activist working for a prominent human rights organization.

[25] In *Ward* at paragraph 70, the Supreme Court of Canada concluded that the meaning assigned to "particular social group" can be identified in three possible categories: 1. groups defined by an innate or unchangeable characteristic; 2. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and 3. groups associated by a former voluntary status, unalterable due to its historical permanence.

[26] In the case at bar, the Board reasonably found that the applicants were not members of a particular social group because of the principal applicant's employment with an international NGO, as the applicant's employment does not correspond to one of the three categories enumerated in *Ward*.

[27] Furthermore, as noted above, it is trite law that the appearance of wealth does not equate to a Convention refugee nexus (*Prophète*, *Carias*). There is insufficient evidence supporting the applicants' contention that they would be subject to persecution because of their political opinion or particular social group. The Court finds that, in these circumstances, the Board's conclusion was reasonably open to it.

[28] For these reasons, I therefore determine that the application for judicial review is dismissed.

[29] The applicants submits the following question for certification:

> In a claim for protection to succeed under section 97 of *IRPA* on the basis of risk "not faced generally by other individuals in or from a country" is it relevant to the factual analysis that

> the risk alleged is the result of the action or inaction of the government in that country, such as that failure to consider this factor amounts to an error of law?

[30] To be certified, the question must be one which transcends the interests of the immediate parties to the litigation, contemplates issues of broad significance or general application, and be one that is determinative of the appeal (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage* (FCA), [1994] F.C.J. No. 1637, at para. 4).

[31] The question proposed by the applicants for certification was not raised or dealt with on the application for judicial review and, as such, is not an appropriate question for certification. Therefore, it shall not be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question of general importance is certified.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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