

Federal Court



Cour fédérale

Date: 20110629

Docket: IMM-4051-10

Citation: 2011 FC 795

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 29, 2011

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

**Maynor Rene Jua HERNANDEZ
Dora Noemi Arev PRADO
Gabriel Alejand PRADO**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by a member of the Refugee Protection Division of the Immigration and Refugee Board (panel) submitted in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act).

[2] The applicants are members of the same family. The father, Maynor Rene Jua Hernandez, and the mother, Dora Noemi Arev Prado, are citizens of Guatemala and their son, Gabriel Alejand Prado, is also a citizen of the United States. They fear the Mara Salvatrucha, a criminal gang that stole and extorted from their family knowing that it was rich and able to pay. The applicants received death threats and the female applicant was seriously hurt by members of this gang before they left their home country on June 17, 2007, to claim protection in Canada. Their claim was rejected on June 17, 2010.

[3] The panel found that section 96 of the Act did not apply on the ground that the principal applicant did not belong to a particular social group within the meaning of the Convention.

[4] The panel also found that the family members were not persons in need of protection under paragraph 97(1)(b) of the Act on the ground that the risk they face is “a generalized risk also faced by other Guatemalan citizens, and consequently, the claimant did not show that he would be subjected to a risk different from that faced by other citizens of Guatemala.”

[5] Section 97 of the Act requires the State of Guatemala to be able to protect them. The applicants filed complaints after their clothing store was robbed in December 2007 and after they were victims of extortion starting in January 2007.

[6] On this determinative issue, the panel wrote the following:

. . . In this case, the police authorities asked the claimant to help identify his attackers, which he apparently refused to do. Therefore, the panel is of the opinion that the claimant did not take advantage of

all the opportunities for protection offered by the authorities in his country before claiming protection in Canada.

[7] The panel's entire analysis on the protection available in Guatemala with respect to the Maras is based on this supposed refusal. Under this circumstance, the provisions of paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, apply. This paragraph provides that the Court may set aside a decision if the panel "based its decision or order on an erroneous finding of fact", which is the situation in this case.

[8] I have read the hearing transcript several times. I believe that the principal applicant never stated that he refused to identify his attackers. The documentary evidence is the opposite of that statement. Exhibit P-14 is a statement by Mr. Hernandez before counsel for Guatemala City that he examined the photo albums but was unable to identify anyone. Exhibit P-15 is counsel's decision to close the matter in the absence of identification.

[9] The application for judicial review will therefore be allowed. No question of importance was raised.

JUDGMENT

The application for judicial review is allowed. The decision dated June 17, 2010, by a member of the Refugee Protection Division of the Immigration and Refugee Board is set aside and the matter is referred back to a differently constituted panel of the Board for redetermination.

“François Lemieux”

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-4051-10

STYLE OF CAUSE: Maynor Rene Jua HERNANDEZ, Dora Noemi Arev PRADO, Gabriel Alejand PRADO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: March 15, 2011

REASONS FOR JUDGMENT AND JUDGMENT: Lemieux J.

DATED: June 29, 2011

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